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Nos. 06-969 and 06-970

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC.

SEN. JOHN MCCAIN, ET AL., APPELLANTS

v.

WISCONSIN RIGHT TO LIFE, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
07/28/2004	1	COMPLAINT against FEDERAL ELECTION COMMISSION (Filing fee $ 150.) filed by WISCONSIN RIGHT TO LIFE, INC..(jf,) (Entered: 07/29/2004)
	* * * * *	
07/28/2004	3	MOTION for Three-Judge Court by WISCONSIN RIGHT TO LIFE, INC.. (jf,) (Entered: 07/29/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
07/28/2004	4	MOTION for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC.. (Attachments: # 1 Memorandum in Support)(jf,) (Entered: 07/29/2004)
		* * * * *
07/29/2004	9	ORDER granting 3 application for Three-Judge Court; status conference set for 8/5/04 at 11:00 a.m. Signed by Judge Ellen S. Huvelle for Judge Oberdorfer on July 29, 2004. (adc) (Entered: 07/29/2004)
		* * * * *
08/12/2004	23	ORDER denying 4 MOTION for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC., for reasons to be set forth in a forthcoming memorandum. Signed by Judge David B. Sentelle, Judge Richard W. Roberts, and Judge Richard J. Leon on 8/12/04. (whb) (Entered: 08/12/2004)

BEST AVAILABLE COPY

DATE	DOCKET NUMBER	PROCEEDINGS
08/13/2004	24	NOTICE OF INTERLOCUTORY APPEAL as to 23 Order on Motion for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC.. Filing fee $ 255, receipt number 126826. (jf,) (Entered: 08/13/2004)
08/13/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 24 Notice of Interlocutory Appeal (jf,) (Entered: 08/13/2004)
08/13/2004	25	MOTION for Preliminary Injunction *Injunction Pending Appeal* by WISCONSIN RIGHT TO LIFE, INC. (Attachments: # 1 Text of Proposed Order) (Nadel, Michael) (Entered: 08/13/2004)
08/17/2004	26	MEMORANDUM OPINION AND ORDER: Parties hereto file supplemental

DATE	DOCKET NUMBER	PROCEEDINGS
		memoranda within ten days of the date of this memorandum and order addressing the question whether this matter should be dismissed. Signed by Three Judge Panel, RICHARD J. LEON, RICHARD W. ROBERTS, DAVID B. SENTELLE on 8/17/04. (whb) (Entered: 08/17/2004)
08/18/2004	27	ORDER denying 25 MOTION for Preliminary Injunction Injunction Pending Appeal by WISCONSIN RIGHT TO LIFE, INC. Signed by Judge Richard J. Leon on 8/18/04. (whb) (Entered: 08/18/2004)
		* * * * *
09/01/2004	30	AMENDED COMPLAINT against FEDERAL ELECTION COMMISSION filed by WISCONSIN RIGHT TO LIFE, INC..(rje,) (Entered: 09/03/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
09/14/2004	31	NOTICE OF INTERLOCUTORY APPEAL as to 23 Order on Motion for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC to U.S. Supreme Court. Filing fee $ 255, receipt number 127904. (rje,) Modified on 9/16/2004 (rje,). (Entered: 09/16/2004)
		* * * * *
09/23/2004	35	Copy of US SUPREME COURT JUDGMENT as to 31 Notice of Appeal filed by WISCONSIN RIGHT TO LIFE, INC. denying plaintiff's application of an injunction pending appeal. (Burgess, Joe) (Entered: 09/23/2004)
		* * * * *
11/09/2004	40	MANDATE of USCA (certified copy)It is hereby ordered that the motion to dismiss be granted; It is further ordered that the emergency motion for in-

DATE	DOCKET NUMBER	PROCEEDINGS
		junction pending appeal and motion to expedite disposition be dismissed as moot; USCA# 04-5292 (jsc) (Entered: 11/10/2004)
		* * * * *
03/14/2005	41	MOTION for Summary Judgment by WISCONSIN RIGHT TO LIFE, INC.. (Attachments: # 1 Memorandum in Support # 2 Statement of Material Facts)(Nadel, Michael) (Entered: 03/14/2005)
		* * * * *
03/28/2005	43	MOTION for Summary Judgment by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Text of Proposed Order) (jf,) (Entered: 03/29/2005)
		* * * * *
05/10/2005	48	MEMORANDUM AND OPINION. Signed by Three Judge Panel on 5/9/05. (whb) (Entered: 05/10/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
05/10/2005	49	ORDER DISMISSING CASE WITH PREJUDICE. Signed by Three Judge Panel on 5/9/05. (whb) (Entered: 05/10/2005)
05/12/2005	50	NOTICE OF APPEAL as to 48 49 Order Dismissing Case entered on 05/10/05 by WISCONSIN RIGHT TO LIFE, INC.. Filing fee $ 255, receipt number 134676. (Attachments: # 1 Proof of Service)(jf,) (Entered: 05/13/2005)
	* * * * *	
05/27/2005		Supreme Court of the United States Case Number 04-1581 for 50 Notice of Appeal filed by WISCONSIN RIGHT TO LIFE, INC.,. (jf,) (Entered: 05/31/2005)
	* * * * *	
02/27/2006	68	ORDER of Supreme Court of the United States (certified copy) as to 50 Notice of Appeal filed by WISCONSIN RIGHT TO LIFE,

DATE	DOCKET NUMBER	PROCEEDINGS
		INC.; It is hereby ordered and adjudged that the judgment of the court is vacated with cost and the case is remanded to the United States District Court for DC to consider the merits of appellant's challenge in the first instance; It is further ordered that the petitioner recover from the Federal Election Commission ($300.00) for cost herein expanded; USCA#04-1581 (jsc) (Entered: 03/31/2006)
		* * * * *
03/23/2006		MINUTE ORDER granting 56 MOTION to Intervene as Defedants by TAMMY BALDWIN, MARTIN MEEHAN, CHRISTOPHER SHAYS, JOHN MCCAIN. Signed by Three Judge Panel (Judge David B. Sentelle, Judge Richard W. Roberts, and Judge Richard J. Leon) on 3/23/06. (lcrjl2) (Entered: 03/23/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
09/01/2006	103	Proposed Findings of Fact by WISCONSIN RIGHT TO LIFE, INC..(Attachments: # 1 Exhibit Exhibit 2: Bailey Dep. Exh. 5# 2 Exhibit Exhibit 1: Bailey Dep. Exh. 1)(Bopp, James) (Entered: 09/01/2006)
		* * * * *
09/01/2006	104	Proposed Findings of Fact by TAMMY BALDWIN, MARTIN MEEHAN, CHRISTOPHER SHAYS, JOHN MCCAIN. (Attachments: # 1 Exhibit 1-3)(Moss, Randolph) (Entered: 09/01/2006)
09/01/2006	105	Proposed Findings of Fact by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Exhibit 70 - 103 in Support of the FEC's Motion for Summary Judgment (Volume 3))(Deeley, Kevin) (Entered: 09/01/2006)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/21/2006	140	ORDERED that #76 Plaintiff Wisconsin Right to Life's Motion for Summary Judgment is GRANTED; and it is further ORDERED that #81 Defendant Federal Election Commission's Motion for Summary Judgment is DENIED. Signed by Three Judge Panel on 12/21/06. (whb) (Entered: 12/21/2006)
12/21/2006	141	OPINION FOR THE COURT FILED BY DISTRICT JUDGE RICHARD J. LEON, IN WHICH CIRCUIT JUDGE DAVID B. SENTELLE JOINS IN FULL. DISSENTING OPINION FILED BY DISTRICT JUDGE RICHARD W. ROBERTS. Signed by Three Judge Panel on 12/21/06. Signed by Judge Richard J. Leon on 12/21/06. (whb) (Entered: 12/21/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
12/26/2006	142	MOTION Seeking Clarification of Decision of December 21, 2006 by FEDERAL ELECTION COMMISSION. (Mueller, Gregory) (Entered: 12/26/2006)
12/27/2006	143	MEMORANDUM re 142 MOTION Seeking Clarification of Decision of December 21, 2006 filed by FEDERAL ELECTION COMMISSION, by WISCONSIN RIGHT TO LIFE, INC.. (Bopp, James) (Entered: 12/27/2006)
12/28/2006	144	REPLY re 143 Memorandum filed by TAMMY BALDWIN, MARTIN MEEHAN, CHRISTOPHER SHAYS, JOHN MCCAIN. (Moss, Randolph) (Entered: 12/28/2006)
12/28/2006	145	ORDERED that 142 Defendant Federal Election Commission's Motion for Clarification is GRANTED. Signed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Three Judge Panel on 12/28/06. (lcrjl2,) (Entered: 12/28/2006)
12/29/2006	146	NOTICE OF APPEAL as to 140 Order,, 141 Memorandum & Opinion,, 145 Order on Motion for Miscellaneous Relief by FEDERAL ELECTION COMMISSION. Fee Status: No Fee Paid. Parties have been notified. (Mueller, Gregory) (Entered: 12/29/2006)
12/29/2006	147	NOTICE OF APPEAL as to 141 Memorandum & Opinion,, 145 Order on Motion for Miscellaneous Relief by TAMMY BALDWIN, MARTIN MEEHA, CHRISTOPHER SHAYS, JOHN MCCAIN. Fee Status: No Fee Paid. Parties have been notified. (Attachments: # 1 Certificate of Service)(Moss, Randolph) (Entered: 12/29/2006)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
01/16/2007		USCA for the Supreme Court, Case Number 06-970 for 147 Notice of Appeal, filed by CHRISTOPHER SHAYS,, MARTIN MEEHAN,, JOHN MCCAIN,, TAMMY BALDWIN,. (jf,) (Entered: 01/18/2007)
01/16/2007		USCA for the Supreme Court, Case Number 06-969 for 146 Notice of Appeal filed by FEDERAL ELECTION COMMISSION,. (jf,) (Entered: 01/18/2007)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV1260 (DBS)(RWR)(RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

FEC's Proposed Findings of Fact

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S PROPOSED FINDINGS OF FACT

Pursuant to the Court's April 17, 2006 Scheduling Order, defendant Federal Election Commission ("Commission" or "FEC") presents the following proposed findings of fact:

I. Plaintiff Wisconsin Right to Life, Inc.

1. Wisconsin Right to Life ("WRTL") describes itself as a nonprofit, nonstock Wisconsin corporation that is tax exempt under 501(c)(4) of the Internal Revenue Code. Am. Ver. Complt. ¶¶ 19, 21.

2. Wisconsin Right to Life is a "very active force in Wisconsin state politics" with "a strong grass-roots organization" which is "often effectively mobilized in elections." Defendant Federal Election Commission's Exhibit Submitted in Support of Its Motion for Summary Judgment ("Exh.") Number 1, Franklin Rep. at 9-10.

3. "[T]he influence of WRTL in turning out pro-life voters is unquestioned by state political observers." Exh. 1, Franklin Rep. at 11.

4. WRTL has approximately 500,000 supporters and approximately 52,000 of them are considered members of the organization. Exh. 1, Franklin Rep. at 9; Exh. 4, Armacost Dep. at 23.

5. WRTL administers its own separate segregated fund, the Wisconsin Right to Life Political Action Committee ("PAC"). The fund is registered with the Commission as a multicandidate political committee under the FECA. *See* Exh. 9, WRTL PAC Statements of Organization; 2 U.S.C. 431(4), 441a(a)(4), 441b(b)(2)(C).

6. WRTL has demonstrated its ability to raise substantial sums of money from its members into its federal PAC, raising nearly $155,000 during the presidential election year of 2000. Exh. 10, Lyons Aff. ¶ 7.

7. WRTL has a long history of opposition to Senator Feingold, making independent expenditures against him through its federal PAC in his 1992 and 1998 campaigns. Exhs. 11-12.

8. In 1998, WRTL spent more than $60,000 on independent expenditures that urged voters to vote against Feingold and for his opponent, including the distribution of thousands of brochures and extensive phone-calling. Exh. 11. Many of those independent expenditures men-

tioned candidates in other races as well. Exh. 11; Exh. 1, Franklin Rep. at 2.

9. WRTL and its federal PAC make the vast majority of their communications through media other than paid broadcast advertising. WRTL has a website; sends out mass emails to thousands of recipients; provides its staff for appearances on TV and radio news shows; publishes op-eds in newspapers; provides quotes for print media stories; holds press conferences; publishes a magazine; distributes brochures, church bulletins, and voter guides; sends out direct mail letters; and pays for automated telephone calls. Exh. 3, WRTL Dep. (Lyons) at 89-115.

10. WRTL had never run a TV or radio ad on the issue of judicial filibusters before it created the advertisements at issue here. Exh. 3, WRTL Dep. (Lyons) at 82.

11. Neither Wisconsin Right to Life Inc. nor its federal or state PAC had ever run any television advertising before the summer of 2004. Exh. 4, Armacost Dep. at 51, 115.

12. The only branch of the WRTL organization that had run television advertising before WRTL ran the TV ad at issue in this case was its 501(c)(3) education fund, which runs educational advertisements discouraging women from getting abortions. Exh. 4, Armacost Dep. at 12-13; WRTL, Veritas Society TV Commercials, http://www.wrtl.org/veritas_tv.htm; Exh. 3, WRTL Dep. (Lyons) at 105-06, 137.

II. The 2004 Wisconsin Senate Election Was Expected to Be Competitive, and Judicial Filibusters Were a Campaign Issue

13. Throughout most of the 2004 election cycle, Senator Feingold appeared to be vulnerable, with less than 50% approval ratings. Exh. 1, Franklin Rep. at 3-4.

14. During the fall of 2004, the widely respected *Cook Political Report* classified the race as one of the most competitive races involving a Democratic incumbent. Exh. 1, Franklin Rep. at 4-5.

15. Competitive races are far more likely to attract interest group spending, particularly expensive television advertising. *See, e.g., McConnell*, 251 F. Supp. 2d 176, 305 (D.D.C. 2003) (Henderson, J.); *id.* at 565-67, 633, 726 (Kollar-Kotelly, J.); *id.* at 878, 881, 908 (Leon, J.).

16. Four candidates vied to be the Republican challenger to Senator Feingold: Bob Welch, Tim Michels, Russ Darrow, and Robert Lorge. Exh. 1, Franklin Rep. at 5.

17. The Republican Party of Wisconsin and all four of the Republican candidates made Senator Feingold's support of filibusters against judicial nominees a campaign issue. Facts 18-28, *infra.*

18. In September, 2003, Bob Welch issued a press release harshly criticizing Senator Feingold for his participation in the "partisan filibuster" that he said led to the withdrawal of one judicial nominee. Exh. 13.

19. In press releases in September and November of 2003, Bob Welch "called on Senator Russ Feingold to end his support of the filibuster of four of President

Bush's judicial nominees" and argued that "[t]he gridlock caused by Russ Feingold's partisanship is appalling. . . . Because of his obstructionism the wheels of justice are in danger of grinding to a halt." Exh. 1, Franklin Rep. at 8.

20. On January 16, 2004, a Bob Welch press release stated that "[r]efusing to allow qualified jurists like Miguel Estrada, Priscilla Owen, Charles Pickering and others to ever have an up-or-down vote on the Senate floor is back room partisan politics at its worst." Exh. 1, Franklin Rep. at 8.

21. At the end of July, Bob Welch's campaign website noted that many "clearly qualified" judicial nominees had their nominations "stonewalled or killed by Russ Feingold" and his Senate allies. Exh. 14 at 6.

22. Tim Michels promised that he would support giving every judicial nominee a vote and asserted that "[t]his issue is rising on people's radar screens." Exh. 15 at 4.

23. Russ Darrow called Feingold "a leader in the stonewalling effort," said "it's the worst kind of politics," and argued that "[i]t's why many Americans want a new face." Exh. 15 at 4-5.

24. Darrow's website listed "not hold[ing] judicial nominations hostage" as one of his main issues. Exh. 16.

25. The Wisconsin Republican Senate candidates frequently discussed the filibuster issue at their campaign stops. Exh. 1, Franklin Rep. at 8.

26. The filibuster issue was addressed during an August 17 debate among the Republican candidates, with Robert Lorge claiming that he would be the most

effective candidate at getting judicial nominees approved. Exh. 17, Xiao Zhang, *Four Republican U.S. Senate Candidates Debate in Milwaukee*, Wis. State J. (Assoc. Pr.), Aug. 18, 2004.

27. The Republican Party of Wisconsin also highlighted Senator Feingold's "obstruction of President Bush's judicial nominees" on its website as one of four reasons "why Russ Feingold should be voted out of office." Exh. 18; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 23.

28. The Chairman of the Wisconsin Republican Party criticized Feingold on the filibuster issue. Exh. 15; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 22.

29. At campaign rallies in September and October of 2004, Vice President Cheney urged that "a good way to deal with the problem of the Democratic filibuster in the Senate is to elect some good Republicans like Tim Michels from Wisconsin." Exh. _, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order ¶ 59; Exh. 19 at 4, Office of the Vice President, *Vice President's Remarks at a Victory 2004 Rally in Eau Claire, Wisconsin*, Sept. 28, 2004 at 5; Exh. 20, Office of the Vice President, *Vice President's Remarks in Ashwaubenon, Wisconsin*, Oct. 21, 2004, at 5.

III. One of WRTL's Two Most Important Election Priorities in 2004 Was to "Send Feingold Packing!"

30. WRTL considered the 2004 Senate election a "key federal race." Exh. 4, Armacost Dep. at 100-01.

31. Defeating Senator Feingold was one of WRTL's top two election priorities in 2004. Facts 32, 38, *infra*.

32. Wisconsin Right to Life itself—not its PAC—issued a press release on March 26, 2004 emphasizing its "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" Exh. 21. The heading of the press release labeled these the "Top Election Priorities for Right to Life Movement in Wisconsin." *Id.*

33. WRTL through its PAC endorsed Feingold's three prominent opponents: Welch, Michels, and Darrow. Exh. 1, Franklin Rep. at 5-6. WRTL cited each candidate's opposition to judicial filibusters as a reason for its endorsement in each of its endorsement letters for the candidates. Exh. 72, Letters from Bonnie Pfaff, WRTL PAC, to Darrow, Welch, and Michels.

34. In a July 15, 2004 "E-Update" email to its supporters, WRTL stated that when voting on Bush judicial nominees, "Feingold has voted to filibuster those nominees 16 out of 16 times!" WRTL noted that its PAC would "vigorously support whichever of the 3" prominent Republican candidates wins the primary, in part because all three had "pledged to allow an up or down vote on the President's judicial nominees." WRTL noted several other positions of its three endorsed candidates and concluded that **"Russ Feingold has the opposite position on all of those issues!"** Exh. 70, WRTL, E-Update, July 15, 2004 at WRTL-S2-185-86.

35. In a press release, WRTL's PAC Chair, Bonnie Pfaff, "stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race," and stated that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." Exh. 22; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 22. The release also stated that all three endorsed candidates had stated that they "would oppose a filibuster of a judicial nominee" with a positive or neutral Judiciary Committee recommendation. Exh. 22. Pfaff urged that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections." Exh. 1, Franklin Rep. at 6; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 22.

36. WRTL's cover story on its spring 2004 edition of its quarterly magazine was "RADICALLY PRO-ABORTION FEINGOLD MUST GO!" WRTL discussed the filibuster of judicial nominees in the article, pointed out that "Feingold has been active in his opposition to Bush's judicial nominees," noted that all three WRTL-endorsed opponents of Feingold "would oppose a filibuster of a judicial nominee if that nominee receives a favorable or neutral recommendation from the Senate Judiciary Committee," and concluded that "FEINGOLD MUST GO!" The article indicated that it was paid for by WRTL's PAC. Exh. 73, *Life Without Limits*, Spring 2004 at 1-2.

37. The cover story of WRTL's Summer 2004 magazine was "Nothing More Important: Re-Electing Pro-Life President Bush and Defeating Pro-Abortion Russ

Feingold." The article indicated that the "top election priorities" for WRTL's PAC were to elect President Bush and "defeat radically pro-abortion U.S. Senator Russ Feingold." WRTL wrote:

> One of Wisconsin's current U.S. Senators, pro-abortion Russ Feingold, faces re-election in the 2004 elections. Feingold has done everything he can to thwart a number of the President's federal judicial nominees at lower court levels and this is only a preview of what Feingold and others would do to defeat President Bush's nominees to the U.S. Supreme Court. The right-to-life community in Wisconsin must do all it can to defeat Feingold and replace him with an individual who will consider President Bush's judicial nominees in a fair manner.

WRTL profiled the three Republican candidates for whom WRTL PAC was "prepared to do all it can to assist the election of that candidate," and noted that all three candidates pledged not to filibuster judicial nominees with favorable or split votes from the Senate Judiciary Committee. Exh. 74, WRTL, *Life Without Limits*, Summer 2004 at 1-2.

38. In a prominent article in the fall 2004 edition of WRTL's magazine, "A Strong Finish in 2004: Bush Wins, Feingold Loses," Barbara Lyons, WRTL's executive director, wrote that the organization's "greatest challenge for 2004" was "to finish strongly in the elections," by winding "up in the win column for President Bush and to retire Senator Feingold." Exh. 24, WRTL, *Life Without Limits*, Fall 2004 at 3. She urged readers "to vote November 2 for President Bush and Tim Michels." *Id.* That particular page of WRTL's magazine was paid for by WRTL's federal PAC. *Id. See also*

Exh. 75 (WRTL PAC thank you letter noting that "[r]eturning George Bush to the Presidency and replacing Senator Russ Feingold with a pro-life U.S. Senator are our primary goals for the 2004 election")

39. An article in WRTL's fall 2004 magazine featured comments from the federal legislative director for National Right to Life discussing the importance of "a single senator [being] defeated in a race in which political observers saw credible evidence that the obstruction of judicial nominees played a significant role in the senator's defeat." Exh. 24, WRTL, *Life Without Limits*, Fall 2004, at 5.

40. Judicial filibusters were one of the five issues highlighted in the voter guide WRTL distributed on the Senate race, a copy of which was included in WRTL's magazine. Exh. 24, WRTL, *Life Without Limits*, Fall 2004, at 15. The voter guide asserted that Michels "has pledged to allow the Senate to vote on President Bush's judicial nominees" whereas Feingold "has voted approximately 20 times since March 2003 to prevent a vote on President Bush's judicial nominees." *Id.* WRTL distributed thousands of the voter guides, including to the approximately 35,000 recipients of its magazine. Exh. 3, WRTL Dep. (Lyons) at 104, 107-10.

41. Through its PAC, WRTL also paid for radio advertising in August or September of 2004 calling explicitly for Feingold's defeat. Exh. 3, WRTL Dep. (Lyons) at 128-31; Exh. 4, Armacost Dep. at 126-27; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 15.

42. At the same time that WRTL and its PAC were identifying Feingold's participation in judicial filibusters

as a reason to defeat him in the election, WRTL was sending out a flurry of "e-alerts" and press releases decrying the role of Senators Kohl and Feingold in the filibusters and urging recipients to tell them to stop the filibusters. Exhs. 25-28.

43. In the 2004 Senate race the judicial nomination issue "was raised early and often as a partisan issue with the Republican candidates and Wisconsin Right to Life citing it as a reason to defeat Sen. Feingold." Exh. 1, Franklin Rep. at 9; Facts 30-39, *supra.*

IV. The Origin of the Specific Advertisements at Issue in This Case

44. In the spring of 2004, WRTL began a campaign on the issue of judicial filibusters using its usual means of communications: mass emails and press releases. Exh. 4, Armacost Dep. at 104-05.

45. The idea to start the campaign originated with Susan Armacost, the Legislative/PAC director who is in charge of WRTL's grassroots lobbying; Mary Klaver, another employee in the Legislative/PAC Department; and Barbara Lyons, WRTL's executive director. Exh. 4, Armacost Dep. at 104-05; Exh. 23 (Armacost Dep. Exh. 1), PAC/Legislative Director job description, Dec. 15, 2005 (one of Armacost's job responsibilities is to "[s]upervise the development and maintenance of a grassroots structure for political activity").

46. The broadcast advertising campaign that led to this lawsuit was "distinct from the other activities of e-mailing [WRTL's] supporters" and was a "whole different matter." Exh. 4, Armacost Dep. at 105.

47. WRTL's designated deponent under Rule 30(b)(6) was unable to state who originated the idea of broadcasting the ads at issue in this case and refused to answer whether the idea had originated with counsel. Exh. 3, WRTL Dep. (Lyons) at 22-24.

48. In another case that has been filed, *Christian Civic League of Maine, Inc.* v. *FEC*, Civ. No. 06-614 (D.D.C. filed Apr. 3, 2006), counsel for WRTL solicited prospective clients to file an additional lawsuit in an effort to get a more expedited ruling than in this case and "potentially clear the way for everyone to do such grass roots lobbying." Exh. 29, Email from John Paulton (Focus on the Family) to Michael Heath (Christian Civic League), *et al.* (March 24, 2006) (enclosing message from counsel for WRTL).

49. Ms. Armacost, who has been involved in all of WRTL's other grass roots lobbying campaigns in her 19 years there, did not develop the idea to run the broadcast ads, "had no role in getting it started," and had "nothing to do with the planning of it or the execution of it." Exh. 4, Armacost Dep. at 5-6, 105-10, 113, 115.

50. Barbara Lyons began conversations with an advertising agency about executing a broadcast media campaign on the filibuster issue in early- to mid-May. The talks led to the advertising agency doing research and then sending a detailed written proposal to WRTL on June 9. Exh. 5, Vanderground Dep. at 86-89.

51. Democratic filibusters of judicial nominees had occurred since the spring of 2003 but WRTL had not run any broadcast advertisements on the issue before Lyons initiated talks with an advertising agency. Exh. 3, WRTL Dep. (Lyons) at 82.

52. In her earliest contacts with the advertising agency about a broadcast media campaign on the filibuster issue, Barbara Lyons indicated that WRTL intended to run advertisements during "a certain time when the ads couldn't run" and that the planned advertisements would lead to a lawsuit. Exh. 5, Vanderground Dep. at 41-43.

53. As early as June 8, 2004, the day before the advertising agency presented a written proposal to handle WRTL's campaign that would challenge the law, someone at the agency was researching the likely discovery battles that would occur in litigation and printed out an article about the discovery that occurred during the *McConnell* litigation. Exh. 30, CFIF.org, Following the Bouncing (and Deflating) Ball in the Discovery Phase of Campaign Finance Litigation, HM-01-111, HM-01-113 (printed on June 8, 2004 at 2:19 p.m.).

54. Jason Vanderground, the consultant at the advertising agency who coordinated the ads, researched the "legal parameters," including how many households the broadcast advertising had to reach in order to be subject to the statute's restrictions. Exh. 5, Vanderground Dep. at 46-50.

55. On a number of occasions, WRTL's vendors were under the impression that the focus of their activities was as much on challenging the Bipartisan Campaign Reform Act ("BCRA") as on conducting a campaign on the judicial filibuster issue. *See* Facts 56-57, *infra*.

56. According to WRTL's website vendor's contract, it was asked to design a website "to promote greater public awareness and involvement in challenging campaign finance reform measures and opposing congressional filibusters." Exh. 49 (Vanderground Dep. Exh. 5),

Estimate Hanon McKendry Wisconsin Right to Life Website Design and Development, July 7, 2004.

57. A public relations firm's initial draft of its contract with WRTL listed the objective of the project as "[t]o raise awareness among the general voting public regarding the violation of the First Amendment Right to Freedom of Speech as a result of judicial filibustering." Exh. 50 (Vanderground Dep. Exh. 6), Public Relations, HM-01-294. The final contract, dated July 9, 2004, described the overall objective as to "[r]aise awareness among the general public regarding the filibustering of the President's judicial nominees, as well as the restrictions placed on citizen groups by the Bipartisan Campaign Reform Act. Exh. 77, Straightline, Wisconsin Right to Life Public Relations Proposal. *See also* Exh. 76, "Filibuster/BiPartisan [sic] Campaign Reform Act—Action Plan" (listing "Key Messages" of the Action Plan).

58. In its magazine, WRTL has referred to its advertisements as being "commercials on McCain-Feingold challenge" rather than as on the judicial filibuster issue. Exh. 42, WRTL, *Accomplishments: 2004*, Life Without Limits, Winter 2005, at 7, http://www.wrtl.org/Winter05LifeWithoutLimits.pdf.

59. In crafting the advertisements to form the basis of this test case and the accompanying publicity campaign, WRTL sought to ensure that the ads did not contain too much overt "negativity" and had a "tone" that was very "reasonable" and "respectful." Facts 60-62, *infra*; Exh. 5, Vanderground Dep. at 134-35.

60. The sign-off on the ads was changed from "Tell Feingold and Kohl to stop filibustering and start playing fair" to its final incarnation of "Contact Senators

Feingold and Kohl and tell them to oppose the filibuster." *Compare* Am. Ver. Complt. Exhs. A-C *with* Exh. 52 (Vandergrund Dep. Exh. 15), Waiting, HM-01-411.

61. Handwritten notes from the files of the advertising consultant contain "No negativity about Kohl + Feingold" immediately following notes about campaign finance law. Exh. 33, handwritten notes, HM-01-58-59 at 58.

62. Lyons removed language from one draft press release that characterized the advertising campaign as "denouncing the actions of Democratic Senators Russell Feingold and Herbert Kohl," explaining to the public relations consultant that "This is a no-no." Exh. 33, Fax from Barbara Lyons to Peggy Howard, July 26, HM 01-45-50 at 48.

63. Part of WRTL's motivation in creating its judicial filibuster advertisements was to create a vehicle for a test case that would challenge BCRA's electioneering communications provision. Facts 44-62, *supra*.

V. WRTL Planned to Time its Advertisements To the Election, Not To Any Filibuster Votes

64. WRTL decided early in its campaign that it would run radio and television advertisements close to Senator Feingold's election, with little regard to when actual judicial filibuster votes (motions to invoke cloture) would occur. Facts 65-73, *infra*.

65. In early- to mid-May, WRTL had already decided that it would ask for court permission to run its filibuster advertisements during the electioneering communications period, between August 15 and Senator Feingold's election in November. Facts 50, 52, *supra*.

66. In the beginning of June, WRTL had already determined that its anti-filibuster campaign would launch around August 1, 2004. Exh. 31, Wisconsin Right to Life, Weekly Activity for Each Campaign Component, WRTL-02-75-76; Exh. 5, Vanderground Dep. at 86-89.

67. WRTL's radio advertisements began on July 26 and its television advertisement began on August 2. Exh. 3, WRTL Dep. (Lyons) at 65.

68. The advertisements began a few days *after* four judicial filibuster votes had occurred and the Senate had departed for a six-week recess. *See* Exh. 3, WRTL Dep. (Lyons) at 65; Exh. 35, U.S. Senate Roll Call Votes, 108th Congress—2nd Session (2004), at 4, http://www.senate.gov/legislative/LIS/rollcalllists/votemenu1082.htm (motions to invoke cloture on four judicial nominees on July 20 and July 22); Days in Session Calendars, http://thomas.loc.gov/home/ds/s1082. html (Senate recessed on July 22 and returned on September 7); Exh. 2, Bailey Decl. ¶ 23.

69. In general, both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant believe that it is important to run grass roots lobbying advertisements shortly before legislative votes are to occur. Exh. 4, Armacost Dep. at 112 (running ads after votes would be "a waste of time"); Exh. 5, Vanderground Dep. at 30-31.

70. Both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant were allegedly tracking the Senate's schedule because of WRTL's planned anti-filibuster campaign. Exh. 4, Armacost Dep. at 120-21; Exh. 5, Vanderground Dep. at 54-56.

71. The ad agency that WRTL used for this lawsuit's advertisements is generally able, when necessary, to create and air radio advertisements in a week and television advertisements in two weeks. Exh. 5, Vanderground Dep. at 24-25. WRTL made no effort, however, to air its advertisements in advance of the judicial filibuster votes that occurred. Exh. 5, Vanderground Dep. at 54-56, 62-63. *See also* Exh. 5, Vanderground Dep. at 86-92.

72. WRTL stuck to the schedule it had planned for months, which was to air the advertisements at a time that was close to the election and would lay the groundwork for a lawsuit, and did not air the advertisements before the filibuster votes that occurred. Facts 64-71, *supra*; Facts 92-93, *infra*.

73. During this litigation, WRTL has repeatedly claimed that it relied on a July 21 news story in setting the schedule for its advertising even though WRTL had essentially determined its schedule more than a month and a half earlier. *Compare* Am. Ver. Complt. ¶ 3; WRTL Mem. in Support of Prelim. Inj. Mot. at 5 [Docket #4]; WRTL Summary Judgment Mot. at 4 & Stmt. of Undisputed Facts, Facts 18-19; *with* Exh. 31, WRTL-02-74-76 (advertising schedule from early June); Exh. 5, Vanderground Dep. at 54-63. *See also* Exh. 98, Filibuster Project Notes, Meeting, July 9, 2004 (final start dates picked by July 9).

74. There were no judicial filibuster votes when the Senate returned following its six-week recess or during the rest of 2004. *See* Exh. 35, U.S. Senate Roll Call Votes, 108th Congress—2nd Session (2004), http://www.senate.gov/legislative/LIS/rollcalllists/votemmenu1082.htm.

75. The scheduling of the judicial filibuster votes that occurred before the recess was largely for the particular purpose of mobilizing voters in the election. Facts 76-79, *infra*.

76. "[C]andidates or their allies [can] easily schedule an issue for 'legislative consideration' during the run-up to an election as a pretext for broadcasting . . . electoral advocacy advertisement[s]." *Christian Civic League of Maine, Inc.* v. *FEC*, 433 F. Supp. 2d 81, 89 (D.D.C. 2006).

77. The judicial filibuster votes were scheduled in order to mobilize conservative voters in the fall election. As one wire story explained, "Republican aides said the move is intended . . . to rally conservative voters in this election season." Exh. 38, UPI, *Senate Dems Block More Bush Judges*, July 22, 2004.

78. On the day that some of the judicial filibuster votes occurred, it was reported that Senator John Cornryn "said the GOP will make judicial nominations an issue in the election." Exh. 39, Dee-Ann Durbin, *U.S. Senate Democrats Block Votes on Michigan Judges*, July 22, 2004, AP Alert.

79. According to an article in the *Washington Times*, "Republicans vowed to make Democratic obstruction of judicial nominees an issue in the November elections," and Senate Majority Leader Bill Frist "made that point clear ... by scheduling a vote" on a judicial nominee. Exh. 40, Charles Hurt, *Democrats Block 6th Judge Pick*, Washington Times, July 21, 2004 at A4.

VI. WRTL Did Not Run Any Advertisements on the Judicial Filibuster Issue When the Issue Became Prominent in the Spring of 2005

80. WRTL did not broadcast any anti-filibuster advertisements in the spring of 2005, when the judicial filibuster controversy actually reached its peak. Exh. 3, WRTL Dep. (Lyons) at 101-03; Fact 81, *infra*.

81. "It was clear" in the spring of 2005 that the filibuster issue was "coming to a head," and groups then spent more than $8.5 million on advertising on both sides of the issue. Exh. 7, Franklin Dep. at 26-27.

82. WRTL and its agents have offered shifting rationales for why WRTL did not run any advertising when filibuster votes were planned outside the election season. Facts 83-85, *infra*.

83. Counsel for WRTL told the Supreme Court that other issues were higher priorities for WRTL after the election. Exh. 48, Supreme Court Oral Argument Transcript, Jan. 17, 2006, http://supremecourtus.gov/oralarguments/argumenttranscripts/04-1581.pdf at 8-10.

84. WRTL's advertising consultant testified that the issue arose too fast in the spring of 2005 for the group to run advertising, Exh. 5, Vanderground Dep. at 146-48, even though the issue actually "had been discussed at some length for some number of months before that." Exh. 7, Franklin Dep. at 27.

85. WRTL's latest explanation is that it did not run advertising at that time because the primary issue then was whether to change the Senate rules to bar filibustering and it was certain that Wisconsin's Democratic Senators would not support such a change. 2nd Lyons

Aff., Exh. 2 to WRTL's Motion for Summary Judgment, ¶ 9.

86. The advertising that groups other than WRTL ran in the spring of 2005 was on the subject of the filibusters themselves, as well as the proposed Senate rule change. *See, e.g.*, Exh. 62 (scripts of five advertisements that ran in the spring of 2005 on the filibuster of judges, not the proposed Senate rule change).

87. Cloture motions on nominees were expected to be voted on in the spring of 2005 and were in fact voted on. *See* Fact 86, *supra*; Exh. 63, U.S. Senate Roll Call Votes, 109th Congress-1st Session (2005), at 13-14 (cloture motion votes on judicial nominees on May 24 and June 7-8) http://www.senate.gov/legislative/LIS/rollcalllists/votemenu1091.htm.

88. WRTL did send an email to its supporters in March of 2005 asking them to contact Senators Kohl and Feingold about the filibuster votes, but only used broadcast advertising in the period before the election in 2004. *See* FEC Exh. 54 (March 16, 2005 email); Facts 67-68, 74, *supra*.

89. During the Supreme Court oral argument in this matter Justice Ginsburg, Justice Scalia, and Chief Justice Roberts all asked WRTL's counsel questions about WRTL's decision not to run any judicial filibuster ads after the 2004 election. Exh. 48, Supreme Court Oral Argument Transcript, Jan. 17, 2006, http://supremecourtus.gov/oralarguments/argumenttranscripts/04-1581.pdf at 8-10. Wisconsin Right to Life then broadcast a radio ad on the filibuster issue approximately ten days after the Supreme Court oral argument. 2nd Lyons Aff., Exh. 2 to WRTL's Motion for Summary Judgment, Exh. A (radio ad dated Jan. 27, 2006). That

advertisement was the first ad on the judicial filibuster issue that it broadcast since it had ceased running the ads at issue here. Exh. 3, WRTL Dep. (Lyons) at 101-03.

VII. WRTL's Advertisements Were Likely to Have Had an Effect on the Senate Election Had They Run During the Electioneering Communications Period

90. WRTL's radio and television ads at issue in this case ran for a substantial amount of air time before the statutory electioneering communication period began on August 15, 2004. Exh. 1, Franklin Rep. at 35.

91. WRTL's ads show examples of people waiting or being delayed and claim that "a group of Senators" are filibustering, or "blocking qualified nominees from a simple 'yes' or 'no' vote." Am. Ver. Complt. Exhs. A-C. The ads attribute the filibusters to "politics at work," argue that the filibusters have caused "gridlock" and created a "state of emergency" in the courts, and then urge viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.*

92. WRTL's radio ads ran approximately 1100 times on 21 stations in Milwaukee, Green Bay and LaCrosse-Eau Claire. Exh. 1, Franklin Rep. at 35; Exh. 3, WRTL Dep. (Lyons) at 85; Exh. 41 (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04.

93. WRTL's television ad ran for two weeks in the same three markets, airing approximately 430 times. Exh. 1, Franklin Rep. at 35; Exh. 3, WRTL Dep. (Lyons) at 86; Exh. 41 (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04.

94. The markets of Milwaukee, Green Bay, and LaCrosse-Eau Claire reach almost 70% of Wisconsin households. Exh. 41, (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04 at WRTL-02-55. Based on its number of gross ratings points, WRTL's television ad likely reached more than 85% of the households in those markets and provided an average of more than five exposures to the ad for each household during the two weeks that it ran. Exh. 1, Franklin Rep. at 35. By reaching more than 85% of the households in those three markets, WRTL was able to reach approximately 60% of the households in Wisconsin five times.

95. WRTL spent approximately $70,000 to create the advertisements at issue in this case, about $78,000 to air the radio ads, and about $86,000 to air the television ad. Exh. 3, WRTL Dep. (Lyons) at 33-37, 44-46, 50, 56.

96. According to WRTL's own calculations, its advertisements made approximately 18 million contacts with the public. Exh. 42, WRTL, *Accomplishments: 2004*, Life Without Limits, Winter 2005, at 7, http://www.wrtl.org/Winter05LifeWithoutLimits.pdf.

97. Had WRTL obtained a preliminary injunction, it would have spent some $100,000 to continue running its advertisements within the electioneering communications period. Exh. 10, Lyons Aff. ¶ 12.

98. Not counting production costs, WRTL spent approximately $160,000 to air its radio and TV ads prior to the electioneering communications period, making 18 million contacts with the public and getting its TV ad played in 60% of Wisconsin's homes. Had WRTL spent an additional $100,000 to run the ads inside the electioneering communications period, it would have made mil-

lions of contacts with the public and reached a substantial number of Wisconsin's homes. Facts 91-97, *supra*.

99. WRTL's advertisements would likely have had a significant electoral effect had WRTL run the ads during the electioneering communications period. Facts 100-113, *infra*.

100. The ads imply that Senator Feingold "supports the filibuster, and thinks that 'politics' are more important than saving courts from a 'state of emergency' or allowing qualified candidates to serve in the federal judiciary." Exh. 2, Bailey Decl. ¶ 17.

101. The ads "portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning." Exh. 2, Bailey Decl. ¶ 16.

102. The WRTL ad would have been one of the many messages that created an impression about Senator Feingold in the weeks before the election that would have informed voters' decisions in the upcoming election. Exh. 2, Bailey Decl. ¶¶ 7-8.

103. WRTL's ads are similar to purported "issue ads" that were run shortly before elections pre-BCRA and told the audience to contact candidates about an issue. Those purported "issue ads" almost always had the purpose and effect of influencing elections. Exh. 2, Bailey Decl. ¶¶ 9-14.

104. Exposure to a political issue in the mass media increases the salience of that particular issue, encouraging voters to see the issue as an important political problem. Exh. 1, Franklin Rep. at 24-27. This effect is known as "agenda setting," whereby voters are more likely to see issues prominently discussed in the mass

media as politically important. WRTL's ads, for example, presented the delay in confirmation of judges as a serious political problem. Exh. 1, Franklin Rep. at 24. The electoral significance of agenda setting is that candidates are differently advantaged by different topics. Therefore, an important aspect of election strategy is defining what topics the election is about. Exh. 1, Franklin Rep. at 27.

105. WRTL's ads increased the salience of the judicial filibuster issue and made it more likely that voters would connect the issue to their evaluation of candidates, and to Senator Feingold in particular. Exh. 1, Franklin Rep. at 35-36

106. By calling attention to an issue, even if not clearly identifying a candidate's position, ads can increase the weight voters give that issue in evaluating a candidate. This is called "priming": voters primed for an issue will evaluate candidates increasingly on the basis of the candidates' views on that issue. Exh. 1, Franklin Rep. at 28-29. Ads that mention a candidate in connection with that "primed" issue make it more likely that voters will blame, or attribute responsibility to, that candidate for his or her position on the issue. Exh. 1, Franklin Rep. at 23.

107. In the case of WRTL's ads, blaming Senator Feingold for his position on the filibuster issue would have increased the importance of this issue to voter evaluations of him. Exh. 1, Franklin Rep. at 29.

108. The mass public is generally inconsistent across issue positions, taking liberal positions on some issues, conservative positions on others. Exh. 1, Franklin Rep. at 29. "Constraint" refers to the extent to which voters develop consistent positions across issues and connect

issues to partisan positions. Exh. 1, Franklin Rep. at 29. Political advertising increases constraint. Exh. 1, Franklin Rep. at 31.

109. One effect of increasing the salience of a particular issue can be to increase the "constraint" effect, making voters more consistent in their position on the issue relative to other issues and linking their position on the issue more clearly to party. Exh. 1, Franklin Rep. at 29. Political advertising increases constraint or polarization by causing voters to become more consistent across issues. Exh. 1, Franklin Rep. at 32.

110. Even before WRTL broadcast its ads, the partisan connection between the filibuster issue and Senator Feingold had been forged through WRTL's public statements criticizing Senator Feingold on the issue, press releases of the Republican candidates for Senate, and media reports on the use of the filibuster issue against Senator Feingold. Because of this preexisting connection, WRTL's advertisements would have increased the salience of the filibuster issue, an issue that any potential Republican nominee could have been expected to press further. Exh. 1, Franklin Rep. at 34-35. Thus, WRTL's ads increased constraint on the filibuster issue and increased partisan alignment on the issue. Exh. 1, Franklin Rep. at 35-36.

111. WRTL's ads were likely to act as a mobilizing force for pro-life voters and WRTL's supporters in the state, and any increase in turnout among this segment of voters would have clearly favored the Republican candidate. Exh. 1, Franklin Rep. at 36.

112. WRTL made some effort to target its ads towards an older, more public policy-aware audience with a male skew, a demographic that is more likely to in-

clude people who could be mobilized to vote against Senator Feingold than a less policy-aware audience. Exh. 1, Franklin Rep. at 35-36.

113. Had they been broadcast during the electioneering communication period, WRTL's ads should have been expected to have electoral effects on the campaign, regardless of their purported purpose. Exh. 1, Franklin Rep. at 24.

VIII. WRTL Also Used Other Means of Communication to Get Its Message Out

114. WRTL employed a number of means of communication in addition to its broadcast advertisements in its judicial filibuster campaign. Facts 115-17, *infra*.

115. WRTL sent letters to Senators Kohl and Feingold, issued press releases, published op-eds in newspapers, and sent mass emails to 5,000-6,000 recipients. It sent approximately 100,000 automated phone messages, created a dedicated website, published articles in its magazine, held press conferences, appeared on television and radio programs, had staff quoted in newspapers and magazines, distributed voter guides addressing the issue (including through direct mail), and made telemarketing calls using the issue to raise funds. Exh. 3, WRTL Dep. (Lyons) at 61-63, 89-115; Exh. 4, Armacost Dep. at 111-12; Exh. 36 (WRTL Dep. (Lyons) Exh. 15), Barbara L. Lyons, *Unprecedented Filibusters Are Un-American: Senators Feingold and Kohl Should Oppose Gridlock*, WRTL-02-19—20; Barbara Lyons, *Nominees Deserve a Vote*, Milwaukee Journal Sentinel, Aug. 6, 2004; Exh. 54, WRTL Dep. (Lyons) Exh. 16, WRTL Press Releases and E-Alerts; Exh. 24, WRTL, *Life Without Limits*, Fall 2004, at 3, 5, 7, 15; Exh. 37,

Filibuster Project Notes, July 9, 2004, HM-01-323—24 (decision to place 100,000 IVR or automated calls); Exh. 55, Email from Barbara Lyons, Jul 21, 2004, FM-01-80—81 (100,000 phone calls scheduled to begin August 1).

116. WRTL spent about $260,000 on its 2004 anti-filibuster campaign, using a variety of public and non-public tools; enlisting the services of an advertising agency, a website creator, pollsters, and a publicist; and drawing on a wide variety of non-broadcast media for publicity. Exh. 56, Plaintiff WRTL's Response to Defendants' Requests for Admissions, Request Nos. 56-57.

117. In July 2004, WRTL's main web site, *www.wrtl.org*, was full of the press releases, "e-alerts" and other materials criticizing Senator Feingold on the filibuster issue. This website was linked to the *www.befair.org* site, created for its filibuster campaign, to which the WRTL ads directed viewers and listeners. *See* Exh. 54 (WRTL Dep. (Lyons) Exh. 16), WRTL Press Releases and E-Alerts; Exhs. 57-59.

IX. WRTL Received A Significant Amount of Funding From Business Corporations in 2004, and Appears to Have Significantly Scaled Back Its Efforts to Raise Funds for Its Federal PAC

118. WRTL raised more than $315,000 from corporations for its general fund in 2004, the "vast majority" from business corporations. This amounted to nearly one-fourth of its total revenues that year. Exh. 3, WRTL Dep. (Lyons) at 147-51; Exh. 60 (WRTL Dep. (Lyons) Exh. 23), Corporate Contributions to General Fund 1/1/04 through 12/31/04. WRTL raised approximately $300,000 in corporate contributions in incre-

ments of $1000 or more and approximately $260,000 of those corporate funds were from business corporations rather than non-profit corporations. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

119. Business corporations made donations to WRTL in 2004 that were as large as $50,000 and $140,000. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

120. Between five and ten business corporations, some from outside Wisconsin, donated a total of more than $50,000—perhaps more than $100,000—specifically to finance the advertisements in this case. Exh. 3, WRTL Dep. (Lyons) at 143-45, 150.

121. WRTL's general fund received eight contributions from individuals that by themselves would have exceeded the $5000 annual limit for each individual's contributions to a multicandidate political committee such as WRTL's PAC. WRTL received contributions from individuals in amounts as large as $25,000, $50,000, and $100,000. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

122. Rather than being unable to raise money for its federal PAC in 2004, it appears that WRTL ceased raising money for that account and shifted its fundraising efforts toward its general treasury. *See* Facts 123-31, *infra*.

123. Although WRTL's PAC raised approximately $155,000 in the 1999-2000 election cycle, it received less

than $13,000 in 2001-02, Exh. 10, Lyons Aff. ¶ 7, and less than $17,000 in 2003-04, Exh. 3, WRTL Dep. (Lyons) at 155.

124. Although the yearly limit on individual contributions to a multicandidate political committee such as WRTL's PAC is $5,000, during the 2003-2004 election cycle WRTL's PAC received contributions from no individual that totaled more than $1,000. *See* Exh. 56, Plaintiff WRTL's Response to Defendants' Requests for Admissions, Request No. 13; FEC Disclosure Reports, available at <http://query.nictusa.com/cgi-bin/fecimg/?C00173278> (visited July 5, 2006); Exh. 44.

125. Receipts by PACs in general increased by 13% from the 1999-2000 election cycle to the 2001-02 election cycle. Exh. 45, FEC, *PAC Activity Increases for 2002 Elections*, Mar. 27, 2003, http://www.fec.gov/press/press2003/20030327pac/20030327pac.html.

126. Between the 2001-02 election cycle and the 2003-04 election cycle, the aggregate annual limit on federal contributions that an individual could make were substantially increased by BCRA § 307, and receipts by PACs in general increased by 34%. Exh. 46, FEC, *PAC Activity Increases for 2004 Elections*, Apr. 13, 2005, http://www.fec.gov/press/press2005/20050412pac/PACFinal2004.html.

127. WRTL has yet to raise any money at all for its federal PAC during the current election cycle. *See* Exh. 47, WRTL April 2006 Quarterly Disclosure Report.

128. PAC receipts nationally increased approximately 50% during the period between the 1999-2000 election cycle and the 2003-04 election cycle, Facts 125-26, *supra*, and WRTL has provided no reason why fund-

raising was harder for its PAC than for everyone else, Exh. 3, WRTL Dep. (Lyons) at 154-64.

129. In 2004, WRTL shifted fundraising efforts from its PAC to its corporate treasury for the filibuster campaign. WRTL had planned to attempt to raise $58,000 in 2004 for its federal PAC through telemarketing, but the PAC did not follow its 2004 plan after January; in the same year, WRTL raised money from its members through telemarketing for the filibuster ads, but deposited the funds into its general treasury rather than its PAC. Exh. 61 (Armacost Dep. Exh. 5), Federal PAC 2004 Budget; Exh. 3, WRTL Dep. (Lyons) at 112-15, 141; FEC Exh. 67 (filibuster campaign fundraising scripts for calls to "Regular Donor[s]" for "General Fund"); Exh. 68 at p. 7 (WRTL's 2004 plan for fundraising appeals not followed after January).

130. WRTL made no special effort in 2004 to raise additional PAC funds or recruit new members. Exh. 3, WRTL Dep. (Lyons) at 153-54, 161-62.

131. The only special effort WRTL made in 2004 to raise funds was to hire an outside fundraiser to solicit funds from a relatively small number of donors to help pay for the ads at issue in this case through its general treasury. Exh. 3, WRTL Dep. (Lyons) at 140-45.

132. WRTL also raised funds for its 2004 filibuster campaign through telemarketing. Exh. 3, WRTL Dep. (Lyons) at 112-15 & Exh. 17.

133. Had WRTL simply raised for its PAC the same amount of money in 2004 that it did in 2000, it would have had more than enough to pay for the additional $100,000 that it intended to spend on the ads that are at

issue here and for a portion of the production costs for the advertisements. Exh. 10, Lyons Aff. ¶ 12.

134. In the 2003-2004 election cycle, WRTL received thirty-five contributions from individuals of $1,000 or more for its general fund. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

135. WRTL never considered the possibility of funding its 2004 electioneering communications through its PAC. Exh. 3, WRTL Dep. (Lyons) at 157.

136. In 2004, WRTL did not spend most of the $14,000 it had in its PAC at the time it sought a preliminary injunction in this case, and it has no explanation for why it did not. Exh. 3, WRTL Dep. (Lyons) at 157.

137. WRTL and its local chapters have communicated with the public in the past using means that it did not employ to publicize its anti-filibuster campaign, including running advertisements in the print media, distribution of brochures, and purchasing billboards. Exh. 3, WRTL Dep. (Lyons) at 96-97, 106-07, 115.

138. The only written documentation that WRTL produced in support of its contention that non-broadcast communications would not be as effective as broadcast in disseminating WRTL's grassroots lobbying messages was a fax from its current advertising agency that was faxed to it a few days before its discovery response was due in 2006. It did not have the document in its possession at the time it planned to run its 2004 advertisements. Exh. 3, WRTL Dep. (Lyons) at 118-19.

139. When WRTL was not successful in getting a preliminary injunction permitting it to run additional broadcast advertising for its judicial filibuster campaign,

it did not even consider putting additional resources into non-broadcast methods of getting its message out. Exh. 5, Vanderground Dep. at 127.

X. Many Legislation-Focused Ads Do Not Clearly Identify Particular Members of Congress But WRTL Never Considered Running Such an Ad on the Filibuster Issue

140. Many legislation-focused ads, such as those broadcast by Citizens for Better Medicare, simply ask viewers to contact Congress or take similar action. *See McConnell* v. *FEC*, 251 F.Supp.2d 176, 545-47 (D.D.C. 2003) (Kollar-Kotelly, J.).

141. In the context of judicial filibuster ads, groups have broadcast advertisements outside of the electioneering communications window that did not clearly identify the Senators whom viewers were being urged to lobby. Facts 142-44, *infra*.

142. In 2005, a group financed an advertisement discouraging a filibuster of John Roberts which did not clearly identify any individual Senators and contained the sign-off "Urge the Senate to give John Roberts a fair up-or-down vote." Exh. 64, "Brilliant" script.

143. In 2005, a group financed an advertisement discouraging a filibuster of Harriet Miers which did not clearly identify any individual Senators and contained the sign-off "Like past nominees, Harriet Miers deserves a fair up-or-down vote in the U.S. Senate." Exh. 64, "Trailblazer" script.

144. In 2005, a group paid to run an advertisement against the filibuster of Samuel Alito which did not clearly identify any individual Senators and contained

the sign-off "Urge the Senate to give Samuel Alito a fair up or down vote." Exh. 64, "Alito" script.

XI. WRTL Spent Almost $60,000 to Run a Radio Advertisement That Did Not Name Any Federal Officeholders During the Electioneering Communication Period as Part of the "Campaign Finance" Phase of Its Purported Grassroots Lobbying Campaign

145. From the outset, WRTL's multi-faceted campaign included a contingency plan, should WRTL be unsuccessful in gaining a preliminary injunction to run its filibuster advertisements, for broadcast advertisements attacking the McCain-Feingold law without naming any officeholders. Facts 146-51, *infra*.

146. In early June, WRTL had already developed a detailed calendar for rolling out different phases of its advertising. WRTL planned its weekly activity for every week from June 13 through the end of August on both the "Anti-Judicial Nominee Filibuster" campaign component and the "Campaign Finance" component. The judicial filibuster component was scheduled to go public on August 1 while the campaign finance component was scheduled to go public on August 15. The campaign finance component included TV or radio ads that were scheduled to be shot the week of August 1 through 7. Exh. 79, WRTL, "Weekly Activity for Each Campaign Component."

147. If WRTL were unsuccessful in securing a preliminary injunction, it planned to broadcast TV and radio ads that were critical of the electioneering communication provision of BCRA but that did not name any federal officeholders. Exh. 80, "Key Legal Dates & Scenarios" (in the event of an unfavorable ruling, plan was to

"[b]egin airing ad that ties filibustering and campaign finance reform together (combo) without identifying Senator Feingold (generic)"; Exh. 81, "Wisconsin Right to Life Action Plan/Timeline" (plan after unfavorable decision was to "[a]ir generic ad"); Exh. 82, Filibuster Project Notes, Meeting, July 9, 2004 ("Create a generic ad mentioning both issues to air when the blackout period is in effect and the court is deciding or we have lost in court.").

148. WRTL had its advertising agency draft a number of TV and radio ads for the second phase of WRTL's 2004 campaign (the "campaign finance" phase) and a number of the drafts did not contain any reference to federal officeholders. *See* Exhs. 83-86 (draft ads); Exh. 87, Working Budget, July 13, 2004 (budget for "two :30 campaign finance reform TV spots" and "two :60 campaign finance reform radio spots"); Exh. 88, Hanon McKendry Job Summaries (over fifty hours spent by advertising agency for "Phase 2" TV and radio spot production). Those ads urged action on federal campaign finance reforms without mentioning any federal officeholders and directed viewers to WRTL's filibuster/BCRA web site. *See, e.g.*, Exh. 84 at HM-S2-088, "Reform Patrol" (Version B), ("More restrictions on free speech. Less information. Was that the intent of campaign finance reform? If this doesn't sound right to you, let's get Washington to fix the problems they created with campaign finance reform... Visit BeFair.org."). *See also* Exh. 89, "Technical Difficulties" (Version C), Aug. 10, 2004 (alternative draft).

149. WRTL ultimately chose to air one radio advertisement during the second phase of its campaign. The ad was called "Technical Difficulties" while being

drafted and was later called "News Bulletin." It criticized recent "campaign finance reform" without naming any federal candidates and encouraged listeners to visit the website that WRTL set up for its judicial filibuster/BCRA challenge campaign. Exh. 90, WRTL, "Wisconsin Right to Life Files Appeal Today in U.S. Court of Appeals, District of Columbia to Protect Integrity of Grassroots Lobbying," Aug. 17, 2004 at FM S045; Exh. 32, Aug. 16, 2004, WRTL Email, WRTL-02-39—40. WRTL spent a little more than $7,000 to produce different versions of "News Bulletin" and paid approximately $50,000 to air the ad during the electioneering communications period in 2004. Exh. 90 Invoice, Aug. 1, 2004; Exh. 92, "Radio Media Plan As Placed, 8/16/04—8/22/04"; Exh. 93, "WRTL Radio Media Plan As Placed, 8/23 / 9/12/2004"; Exh. 94 (radio station invoices).

150. WRTL's "news bulletin" ad directed viewers to its filibuster/BCRA challenge web site ("BeFair.org"). Exh. 90, WRTL, "Wisconsin Right to Life Files Appeal Today in U.S. Court of Appeals, District of Columbia to Protect Integrity of Grassroots Lobbying," Aug. 17, 2004 at FM S045; Exh. 32, Aug. 16, 2004, WRTL Email, WRTL-02-39—40. At that site, WRTL urged Wisconsin residents to contact their Senators in order to "ask them to permanently fix the problems with campaign finance reform that they helped to create" and ask them to support a specific bill then-pending in Congress, the "First Amendment Restoration Act." Exh. 95, WRTL, "Ask Your Senators to Fix the Problem."

151. WRTL's contingency plan if it obtained a preliminary injunction from this Court was not only to run the anti-filibuster ads after August 14 but also to seek

this Court's permission to run advertisements on the campaign finance issue referring only to Senator Feingold and not to Senator Kohl. FEC Exh. 76; Exh. 96 "Key Legal Dates & Scenarios," (in the event of a favorable ruling plan was to "[r]equest permission from U.S. District Court to air campaign finance reform spots that call on Senator Feingold to remedy the situation"); Exh. 97, "Revised On-air Schedule"; Exh. 98, Filibuster Project Notes, Meeting, July 9, 2004 ("Create another filibuster ad which asks Feingold to sponsor legislation to allow lobbying ads in an election cycle to test if we win in court with the first ads."); Exh. 99, "Wisconsin Right to Life Action Plan/Timeline" (plan after favorable decision was to "[s]eek approval for second flight of ads").

152. In preparation for the contingency of a favorable decision from this Court on the filibuster advertisements, WRTL's advertising agency prepared a script for a television advertisement that criticized campaign finance reform and concluded "More restrictions on free speech. Less information. Was that the intent of campaign finance reform? If this doesn't sound right to you, ask Senator Fiengold [sic] to fix the problems with campaign finance reform that he helped to create... Visit BeFair.org." Exh. 100, "Reform Patrol" (Version C), Aug. 3, 2004. The advertising agency also prepared draft scripts that mentioned Senator Kohl as well as Senator Feingold. *See* Exh. 101, "Technical Difficulties" (Version B), Aug. 9, 2004.

153. In the polling that it conducted in advance of its advertising campaigns, WRTL specifically tested several questions that focused solely on Senator Feingold in order to learn the public's "Opinions About Senator

Feingold." In addition to other questions, WRTL tested the following questions:

> "Having heard more information about this one part of the new campaign finance reform law, do you believe it was the intention of Senator Russ Feingold to prevent citizens from being able to lobby their own Member of Congress on important upcoming votes in Congress during the election campaign?
>
> And, do you believe Senator Russ Feingold SHOULD or SHOULD NOT sponsor a bill in the Senate to allow citizen groups to express their views to Members of Congress on important upcoming votes in Congress regardless of when those votes are occurring?

Exh. 102, Wisconsin Statewide Benchmark Study, June 29-30, 2004, at WRTL-S2-202; Exh. 103, Robert K. Autry, NMB Research, "What Wisconsin Thinks About Campaign Finance Reform and the Filibustering of Judicial Nominees," July 9, 2004, Slides 57-62.

Respectfully submitted,

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September 1, 2006

[FEC Exhibit 2]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 2 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

DECLARATION OF DOUGLAS L. BAILEY

1. My name is Douglas L. Bailey. In 1968, I founded Bailey, Deardourff & Associates, which was among the first national political consulting firms working for Republican candidates for Governor, Congress, Senate, and President. Our clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for Governor or the United States Senate in 17 states. We also did political ads for political parties and issue groups. A copy of my curriculum vitae is attached to this declaration.

2. As campaign consultant, my job was to plan the campaign and then create broadcast advertisements that would shape its outcome. In 2000, John Deardourff and I were each among the first eight recipients of the American University-Campaign Management Institute's "Outstanding Contribution to Campaign Consulting" Award given to the consultants who have best represented the ideals of the profession and shown concern

for the consequences of campaigns on public attitudes about our democratic process.

3. I also have extensive experience consulting on various citizens' initiatives and other grass roots issue campaigns. For example, I have advised among others Handgun Control, Inc., Floridians Against Casinos, and League of Conservation Voters.

4. In 1987 I co-founded The Hotline, a bipartisan daily briefing that covers the media coverage of campaigns, candidates, and specific political issues raised in over 2,500 media sources nationally, including television, radio, and newspapers across the country. Its audience includes the White House, Congress, both political parties, the political consultancy industry, numerous special interest groups, and a wide variety of national media outlets. The Hotline was sold to the National Journal in 1996. I have continued as a Senior Advisor at The Hotline to this day.

5. From 2001 through the 2004 election, I was the president of Freedom's Answer, a non-partisan voter turnout program co-founded with Mike McCurry, former Press Secretary to President Clinton. Our purpose in founding Freedom's Answer was to counteract declining voter turnout, particularly among young people. In 2002, the program helped create the largest voter turnout ever in a non-presidential year (both nationally and in 27 different states). In 2004, it contributed to an astounding increase of 17 million voters above the 2000 presidential turnout.

6. I have not served as an expert witness in the last four years, although I submitted a fact witness declaration in *McConnen* v. *FEC*. I am receiving no compensa-

tion for this declaration. A list of my publications for the last 10 years is attached.

7. The quintessential purpose of a political consultant's role in designing an advertising campaign for a specific candidate is to create a cumulative, positive general impression of the candidate and provide a favorable context in which the voters can make a decision about that candidate. In contrast to commercial transactions for which advertising is run, nearly all political "sales" take place on a single day—election day. The context for voters' decisions is created by what happens leading up to election day. Aggressive political campaigns always seek to create the most favorable context in which voters are asked to make their decisions, based on the goals of the group sponsoring the advertisement. Broadcast advertisements about candidates are short in duration and the image sought cannot be achieved in only one or two ads. However, over time, a campaign consultant will attempt to define a candidate through a combination of style, image, and issues. Each advertisement that airs in support of a candidate in the months leading up to an election is intended to give voters a "feel" for the candidate.

8. Arguably the most important voters -- the "swing" voters that will ultimately decide the outcome of the election-rarely vote for a candidate based solely or even significantly on substantive positions that the candidate has on the issues. Rather, these voters will support a candidate if they perceive that the candidate is likeable and shares similar values to them. A campaign consultant will often use a substantive issue simply as a vehicle to help persuade targeted voters that the candidate shares their values, and to make the voters comfortable

with the candidate. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these "feels" to make up a campaign. So-called issue ads that mention a candidate by name, whether in a positive or negative context, will undoubtedly influence the election because such ads are merely another method of providing voters with a feel for the candidate.

9. Prior to BCRA, so-called issue ads financed by soft money were an integral part of candidate election campaigns, and they were often part of a concerted joint effort and overall plan between advocacy groups and the candidate to elect the candidate. Competent political consultants know that true issue ads run in the time period immediately preceding the election are largely ineffective at actually raising voter awareness of, or interest in, a particular issue. In the time period preceding the election, true issue ads are likely to be drowned out and overwhelmed by the large volume of various political ads seeking to influence the election. Issue ads run during this time that go out of their way to mention a candidate's name inexorably intertwine with the campaign election message itself, augmenting voters' overall perception of candidates by providing additional context in which to view the candidate.

10. A true issue ad campaign is most effective when it is aired outside of the time period immediately before an election, when its message—even if the message refers to an officeholder—will not be received as another variety of candidate campaign ad. By contrast, an ad run shortly before an election that specifically mentions a candidate's name—even one purportedly about an

issue—almost always is designed to and always has the effect of being part of a campaign package to subtly influence a voter to reach certain conclusions about the candidate while giving the voter the impression he came to that conclusion entirely independent of political propaganda.

11. A purported issue ad that airs in the time immediately preceding an election that implores a voter to "contact"or "tell" a candidate about one's opposition to a certain policy will unavoidably affect that candidate's election. During the election time period, the implicit message to the voter is that one way to change the policy would be to remove that candidate from office on election day. Conversely, an issue ad which airs during the pre-election period and implores a voter to contact or tell a candidate about one's support for a particular policy, implicitly suggests that one way to continue that policy is to vote for the reference candidate.

12. Context and timing will ordinarily determine whether an ad is a true issue ad or an electioneering ad in disguise. While an ad that refers to a candidate may have an effect as an issue ad a year away from an election, that same ad will impact the viewer as an electioneering ad when it is aired right before an election. In the midst of swirling campaign activity, the primary impact of an ad that mentions a candidate's name will be as an electioneering ad. In short, the audience is simply unlikely to distinguish between the issue in the ad as opposed to the more prevalent election activity when the so-called issue ad mentions a specific candidate's name.

13. There is no practical difference, in the context of an election, between asking the audience to "contact" a Congressman or Senator regarding a "negative" issue

about which his position is widely known, or to "vote against" him, at least in part because of it. I believe that it is actually more effective in many cases to use indirect words such a "contact" instead of direct appeals such as "vote for" or "vote against" because often voters will respond more favorably to a political message employing subtlety.

14. The context and environment in which an ad airs is an important consideration in designing the ad and how the ad will be perceived by the viewer. Competent interest and advocacy groups are fully cognizant of this dynamic and would only run a so-called issue ad or grassroots lobbying ad in the run-up to an election with full knowledge that it is the functional equivalent of electioneering. Before BCRA, advocacy and interest groups aired many more purported issue ads in the time period immediately preceding an election, and those ostensible issue ads were much more likely to mention a candidate by name. As any experienced campaign consultant knows, ads that mention a candidate by name in the time period immediately preceding an election are likely intended to influence, and unavoidably will influence, that election.

15. Issue organizations can design true issue ads without ever mentioning specific candidates for federal office. When we were creating true issue ads at Bailey, Deardourff (*e.g.*, for ballot initiatives or more general issues such as handgun control), and when we were creating true party building ads, it was never necessary for us to reference specific candidates for federal office in order to create effective issue ads.

16. Based on my experience in campaigns, I believe WRTL's filibuster issue ads undeniably would have in-

fluenced the election had they been aired at the intended time. When viewed in the context of the timeframe they were intended to air, they portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning. The ads disparage a "group of senators" for blocking qualified candidates from serving as judges, and using politics to cause "gridlock and back up some of our courts to a state of emergency." The ads then specifically urge voters to contact Senators Feingold and Kohl and tell them to oppose the filibuster.

17. The logical and unavoidable implication of the ads is that Senator Feingold (the only Senator mentioned who was up for reelection) supports the filibuster, and thinks that "politics" are more important than saving courts from a "state of emergency"or allowing qualified candidates to serve in the federal judiciary. Indeed, there would be no reason to tell voters to contact Feingold and Kohl urging them to oppose the filibuster if they were already opposed to it.

18. The fact that the proposed ads deal with both a candidate (Feingold) and a non-candidate (Kohl) equally and did not single out the candidate is of no practical consequence in terms of the implicit message communicated to voters, *i.e.*, express your displeasure and disregard by complaining to Kohl and by voting against Feingold.

19. In assessing the effect of the three WRTL ads, it is relevant to consider the context of WRTL's explicit advocacy against Senator Feingold. WRTL, Senator Feingold's Republican opponents, and the Wisconsin Republican Party had criticized Feingold for his support of the judicial filibusters and had made it a significant

campaign issue. Specifically, WRTL had released press statements critical of Senators Feingold and Kohl on July 14, and July 21, 2004. In its July 14 press release, WRTL noted that it had "grave concerns" that Senators Feingold and Kohl had "voted 16 out of 16 times to filibuster judicial candidates." The same press release also noted that Miguel Estrada had to withdraw his nomination after two years of having it filibustered. In its July 21 press release, WRTL stated that "the Senate, with the assistance of Senators Kohl and Feingold, has voted to continue its unprecedented filibuster of judicial nominees."

20. Though WRTL criticized Senators Feingold and Kohl for two years of filibusters, and lamented that one "well-qualified" judge had already had to withdraw his nomination, it did not start to run its so-called grassroots lobbying ads until right before the upcoming election. Pre-BCRA, this pre-election period was consistently the time when most "issue ads" financed with soft money were aired in a thinly disguised attempt to influence the election. By WRTL's own admission, the filibuster issue was a longstanding one. If WRTL had truly wanted to run effective issue ads, it would have been best, as every competent campaign consultant knows, to run them long before the election - or even after the election, when the clamor of competing campaign messages would have died down. Instead, WRTL followed the historical pattern of attempting to run so-called issue ads that mention a candidate's name just prior to the election. Advocacy groups adopt this approach primarily to influence the election.

21. WRTL's ads provided no phone number, URL, address, or other contact information allowing listeners

or viewers to actually contact Senators Feingold and Kohl, as WRTL encourages. Instead, the ad directs listeners to WRTL's own website where, it says, contact information for Feingold could be found. But no information necessary to contact Feingold is provided by the ad itself. Indeed, the ad directed viewers and listeners to WRTL's website, which through its e-alerts, was explicitly critical of Senator Feingold's position on filibusters. This too is relevant in my assessment that the ads would have an electoral impact.

22. From a campaign consultant's point of view, WRTL's ads (airing in the heat of an election campaign) telling voters to contact Senators Feingold and Kohl would have been ineffective for the purpose of influencing the filibuster fight in Congress. The ads, however, would undoubtedly have been effective as electioneering ads, implicitly portraying Senator Feingold as "unfair," and providing a negative general context in which voters would view him when they cast their ballots.

23. WRTL's advertising strategy is inconsistent with an advocacy group that wished to engage in "grassroots lobbying." WRTL did not begin to air its advertisements until a few days *after* several judicial filibusters had happened. Any competent consultant who truly wished to engage in "grassroots lobbying" would have run issue ads in the time leading up to the July filibusters, when the message would not have been obfuscated by the abundance of electioneering ads. Nor would any competent campaign consultant run ads after July 22, 2004, when the Senate left for summer recess.

24. WRTL's proposed grassroots lobbying exception would allow political consultants to design ads to influence voter behavior by portraying an issue (and/or poli-

ticians supporting that issue) in a positive or negative light, and then asking the audience to contact the incumbent politician to oppose or support that legislation, initiative or measure. These ostensible issue ads would have a profound and direct impact on candidate elections. There are and always will be hot-button political issues before Congress right before any election that could be used as a pretext for airing supposed issue ads within the immediate pre-election time frame of BCRA.

25. Examine, for example, the pertinent text of WRTL's proposed "Loan" ad, one of the radio ads at issue in this case.

> Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve.
>
> It's politics at work, causing gridlock ad backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org.
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

26. Under WRTL's proposed exception to BCRA, campaign consultants will be able to easily design grassroots lobbying ads that are much more vitriolic, insidious, and emotive than the ads at issue in this case. While the ads will be grassroots lobbying in name, they will be electioneering ads in reality and effect. Political consultants, advocacy groups, and other parties will develop ads that will render the grassroots lobbying ads/sham issue ads distinction as meaningless as the former issue advocacy/express advocacy distinction.

27. Under WRTL's notion of issue advertising, nothing would stop it from modifying the above ad to read as follows:

> Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators *tied to a radical pro-abortion philosophy* is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve, because *the Senators do not have a modicum of respect for human life.*
>
> The Senators are putting politics ahead of democracy and fairness, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to make sure that these un-American tactics stop and to vote to end the filibuster.
>
> Visit: BeFair.org.

> Paid for by the Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

The italicized portions of this modified ad quote language in the preceding paragraph is from a WRTL press release characterizing Senator Feingold after he voted against Unborn Victims of Violence Act. R. at 18, Ex.20.

28. Similarly, a pro-choice group such as Planned Parenthood could design an inflammatory and diametrically opposed ad that would fit WRTL's grassroots lobbying exception. For example:

> Right now, the Senate is trying to push through a group of radically right-wing judges to serve on the Federal Courts of Appeal. These judges want to invade your right to decide if and when you will have a family, and insert themselves into women's reproductive choices and control what choices women make affecting their bodies. These judges have made it clear that they will take away a woman's right to choose.
>
> The only thing standing between you and your right to choose is a brave group of Senators who refuse to confirm these judges who will not respect your existing rights.
>
> But the political pressure is mounting. Call Senators Feingold and Kohl and tell them to oppose these radical judicial confirmations.
>
> Paid for by Planned Parenthood of Wisconsin, which is responsible for the content of this adver-

tising and not authorized by an candidate or candidate's committee.

29. These two hypothetical, yet conceivably allowable, ads have a clear political message that will influence the electorate if they are aired immediately before an election (even with the required disclaimer that the ads are not authorized by any candidate). The unavoidable result is that the ads would necessarily become a part of the election campaign, and would serve to persuade voters how to cast their ballots. In reality and effect, grassroots lobbying ads specifically mentioning candidates and aired within the pre-election time period are exactly what pre-BCRA issue ads were, the functional equivalent of electioneering ads.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ DOUGLAS L. BAILEY
DOUGLAS L. BAILEY

June 2, 2006
Date

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Founder (with Mike McCurry), Freedom's Answer (2001-2004)

The non-profit program was designed to be the nation's largest-ever non-partisan voter turnout program, causing high school students to recruit ten voter pledges each from parents, neighbors, friends. In 2002, it helped create the largest voter turnout ever in a non-presidential year (both nationally and in 27 different states); in 2004 it contributed to an astounding increase of 17,000,000 voters above the 2000 presidential turnout. Its goal was to empower students too young to vote what participation can mean.

Founder, Youth-e-Vote, Inc. (Non-profit, non-partisan 501(c)(3))

The first national registration and online voting in American history was an unofficial student vote for President, Senate, Governor and key issues in 2000. 1.3 million students (most too young to vote officially) made it by far the largest online vote ever.

Founder, CEO, Freedom Channel Inc. (2000)

The non-profit FreedomChannel.com was the first-ever experiment with video on demand from House, Senate, Governor, and presidential candidates - allowing users to "dial up" the candidates of their choice on the issues of their choice at the time of

their choice. CA 2000 direct-to-camera videos were provided by the candidates, setting a trend for years to come.

Co-Director of the Rolling Cyber Debate (Fall 2000)

With Mike McCurry and for the Markle Foundation, he negotiated and over saw a daily online interchange between the presidential candidates, carried online by WebWhiteBlue.org and 17 of the largest online traffic centers.

Founder, Publisher, Senior Advisor, *The Hotline* (1987-present)

The Hotline is a bipartisan, daily, online briefing on American politics that "covers the coverage" of politics from TV, radio and 300 dailies. Its audience includes:

The national TV networks	House of Representatives
60 daily newspapers	The U.S. Senate
The consultant industry	The White House
The interest groups	The political parties

The Hotline was founded by Bailey (and Roger Craver) in 1987, and sold to National Journal, Inc. in 1996. Bailey continues as a part-time consultant.

Founder and President Bailey, Deardourff and Associates (1968-1987)

Bailey, Deardourff was among the first national political consulting firms, working for Republican candidates for Governor, Senate and president including:

President Ford; Senators Brooke, Bond, Danforth, Percy, Schweiker, Chaffee, Lugar, Stafford, Baker; Governors Kean, Milliken, Rhodes, Orr, Bowen, J. Thompson, Alexander, Bond, Snelling, Cahill, Thornburgh, Rhodes, Ray, Quie, DuPont.

Education

A.B.Colgate University, 1954

M.A., M.A.L.D., Ph.D, The Fletcher School of Law and Diplomacy, Tufts 1957-1962

Publications Within Last 10 Years - Douglas L. Bailey

If the Policitians Really Want to Help..., L.A. Times, Sept. 20, 2005, at 13 (and in other newspapers, co-authored with Gerald Rafshoon).

How Issue Ads Are Designed to Target Federal Candidates without "Express Advocacy," in *Inside the Campaign Finance Battle*, 252-53 (Corrado, Mann, Potter, eds., 2003).

A Prime-Time Opportunity for Voters?, Cleveland Plain Dealer, June 29, 1996, at 10B.

[FEC Exhibit 15]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 15 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

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Tuesday, November 18, 2003

News

3 seeking Feingold seat attack him on judges issue

CRAIG GILBERT
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3 seeking Feingold seat attack him on judges issue. Republicans see Senate fight as important to voters.

By CRAIG GILBERT cgilbert@journalsentinel.com. Journal Sentinel.

Tuesday, November 18, 2003.

Washington—Amid a lot of bitter venting on both sides, Pennsylvania Republican Arlen Specter defended last week's marathon Senate debate on the blocking of a handful of Bush judicial nominees.

"We're trying to make C-SPAN the channel of choice," said Specter, who called the round-the-clock speech-a-thon "even more interesting than the soaps."

North Dakota Democrat Bryon Dorgan suggested C-SPAN watchers were having a different reaction – that we're "just a bunch of windbags in blue suite."

When it comes to the war over federal judges, there's virtually nothing the two parties agree on.

Not who's right and who's wrong.

Not how it plays politically.

Not whether anybody out there even cares.

In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters. Feingold and fellow Senate Democrat Herb Kohl both sit on the Judiciary Committee.

"I think it will be a huge issue," said GOP Senate candidate Russ Darrow. Feingold doubts that.

"My opponents are trying to latch onto this, I think, because they're really stubbing their toes on some of their other issues." Feingold said. "People are much more focused on the health care and jobs and Iraq."

Whether the fight on judges remains a C-SPAN story—fodder mainly for each party's hard core—or looms larger in the 2004 elections may be answered in contests like Feingold's.

For now, it epitomizes an angry hardening between the parties in Washington. Last week's debate was a classic case of two sides talking past each other to their cheering sections at home, with ever dwindling portions of senatorial goodwill.

Utah Republican Orrin Hatch accused Democrats of treating President Bush's judicial nominees like "dirt."

Bush called the Democrats' conduct "shameful." New York Democrat Hillary Rodham Clinton said the nominees blocked by Democrats were "lemons." Massachusetts Democrat Edward Kennedy said Democrats would "continue to resist any Neanderthal that is nominated by this president."

Republicans are furious over the fact that Democrats have taken an entrenched tactic of the party out of power, the Senate filibuster, and applied it where it has rarely been used in the past—the confirmation of a president's nominees to the federal court.

The threat of a filibuster means it takes 60 votes to pass something, not a simple majority of 50.

That has allowed Senate Democrats to stop or delay six nominees (including two new ones Friday) who otherwise would win majority approval. All those nominees are for the federal appellate courts.

Democrats respond that they've approved the overwhelming majority of Bush's judicial picks—168 confirmed, six blocked. And they say Republicans used different tactics to kill far more nominations by the previous president, Democrat Bill Clinton.

Hypocrisy, extremism charged.

The result of the escalating judicial wars is an intensely partisan standoff featuring mutual accusations of hypocrisy and extremism. In Washington, the issue is often portrayed as a hot button that stokes activists and raises money but hasn't engaged average Americans.

Republicans are hoping to change that.

State Republicans Chairman Rick Graber contends that with both Kohl and Feingold on the Senate Judiciary Committee, Wisconsin Republicans are "very well aware of (the issue). It's something the Senate candidates (against Feingold) are talking about at every stop. I think talk radio is talking about it around the state."

As for the broad public, Graber said, "I have a tough time arguing that it's up there with the economy and the war against terrorism," but "to say no one's paying attention is wrong."

Graber accuses Kohl, Feingold and other Democrats of "playing strictly political games" and of "incredible hypocrisy" for demanding nominees get a vote when Bill Clinton was president, then depriving some nominees of votes under Bush.

Vacancy rate under 5%.

Kohl, who is not up for re-election, took to the floor during debate Thursday to note that more than 95% of federal judgeships are filled, the highest rate in well over a decade.

"When you have a vacancy rate of less than 5 percent, how can anyone make the argument that there is something sinister going on?" Kohl asked.

"When I bring these facts up to audiences (in Wisconsin), some of which are more or less inclined to be Republicans, the issue just ends," Kohl said in an interview.

Kohl said of Republicans: "To say they should get to nominate and vote on and install any and every judge? That the minority has no rights? That to me is extreme."

Kohl's office said last week that he had voted for 94.8% of Bush's judicial nominees and opposed 12 nominees for the federal bench in 15 years.

The issue is sure to be joined in the Feingold Senate campaign.

Feingold 'blindly followed.'

In a statement Friday, Republican hopeful Bob Welch said Feingold "has blindly followed the liberal leadership of his party who are intent on embarrassing our president at every turn."

He quoted comments Feingold made in 1999 about the GOP's failure to move a Clinton nominee: "A nomination delayed is justice delayed. As we know, justice delayed is justice denied. A vacancy unfilled is justice unfulfilled."

Welch said the filibuster of judges was a dangerous precedent that would lead to a political backlash against Democrats.

Tim Michels, another Republican Senate candidate, said nominees from both parties should routinely be entitled to up-or-down floor votes.

"I would always support a judicial nominee getting an opportunity to go in front of the Senate and receive a vote, whether it's a Republican president of Democratic president," Michels said. "This issue is rising on people's radar screens."

Darrow, the other Republican in the race, called Feingold a "leader in the stonewalling effort" of judges.

"I think it's the worst kind of politics. It's why many Americans want a new face," Darrow said.

Feingold said his 1999 comments cited by Welch and other Republicans were prompted by the failure of Senate Republicans to even grant a committee hearing to some Clinton nominee.

"What I saw during the second term of President Clinton was a systematic effort on the part of Senate Republicans to block President Clinton's right to have his judges considered," said Feingold, suggesting there was more fairness in allowing nominees to at least proceed out of committee to the floor, even if some were held to a 60-vote threshold.

"I don't agree with those who say it requires a majority vote in every case," he said.

According to his office, Feingold has voted against eight of the 168 judges confirmed so far and against seven who have not been confirmed.

Feingold said his reasons for opposing the filibustered nominees go beyond ideology to issues such as ethics or the failure to answer questions or "evidence a person is hostile to settled law."

"I don't think it's damaging if it's done on a very limited basis," Feingold said of the filibuster. "There is no role for the Senate if we just approve everybody."

------ INDEX REFERENCES -------

NEWS SUBJECT: (Domestic Politics (GPOL); Elections (GVOTE); Upper House (GVUPH); Political/General News (GCAT); Government Bodies (GVBOD); Legislative Branch (GVCNG))

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11/18/03 MLWK 2A

[FEC Exhibit 21]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 21 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

Wisconsin Right to Life NEWS RELEASE
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

For immediate release: Friday, March 26, 2004

Contact: Susan Armacost, Legislative/PAC Director

FEINGOLD'S, KOHL'S AND KERRY'S VOTES AGAINST UNBORN VICTIMS BILL DEMONSTRATES AN UTTER DISRESPECT FOR HUMAN LIFE!

Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush ... Send Feingold Packing!

If there ever was an event that demonstrates how radical and out of touch some federal office holders are, one only has to look at how Wisconsin Senators Russ Feingold and Herb Kohl and presidential candidate John Kerry voted yesterday on the *Unborn Victims of Violence Act*. Feingold is running for re-election in November and John Kerry wants to be the next President of the United States.

"The passage of the Unborn Victims of Violence Act passed by a wide margin yesterday and President Bush will sign the legislation into law," said Susan Armacost, Legislative Director for Wisconsin Right to Life. "While that is a tremendous victory, it is deeply disturbing that Wisconsin's senators and John Kerry are so tied to the radical pro-abortion philosophy that they cannot even bring themselves to respect the lives of unborn children in a non-abortion context."

Wisconsin Right to Life's parent organization, the National Right to Life Committee (NRLC) was the lead national organization in promoting the *Unborn Victims of Violence Act.* In commenting on John Kerry's vote against the bill, NRLC's Legislative Director Douglas Johnson said, "Apparently, John Kerry believes that if a criminal commits a federal crime that injures a pregnant woman and kills her unborn son or daughter, prosecutors should tell the grieving mother that she did not really lose a baby."

Three national polls show that about 80% of the public agrees that a crime like the killing of Laci and Conner Peterson has two victims and should be charged as two homicides. But the position of Feingold, Kohl and Kerry is only supported by 7 to 10% of the public.

Sharon Rocha, mother of Laci Peterson and grandmother of Conner Peterson, had pleaded with Feingold to support the *Unborn Victims of Violence Act.*

After the U. S. House of Representatives passed the *Unborn Victims of Violence Act* on February 26, President George W. Bush issued a statement saying, "Pregnant women who have been harmed by violence and their families, know that there are two victims—the mother and the unborn child—and both victims should be protected by federal law. I urge the Senate to pass this bill so that I can sign it into law."

Wisconsin Right to Life worked with several families who had lost unborn children under similar tragic circumstances and with Rep. Steve Freese and State Sen. Bob Welch to enact a state unborn victims bill. Then-Governor Tommy Thompson signed the measure into law in 1998 and it is one of the strongest measures of its kind in the nation. The federal unborn victims bill

passed yesterday is necessary to address federal crimes that cannot be included in state unborn victims laws.

"One of the most important elections in the history of the right to life movement will take place in November," said Armacost. The people who represent us in Washington should, at the very least, have some modicum of respect for human life. Apparently, Feingold, Kohl and Kerry do not. This issue only increases our resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!"

[FEC Exhibit 22]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 22 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

Wisconsin Right to Life PAC NEWS RELEASE
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007
***For immediate release*: Friday, March 5, 2004**

Contact: Bonnie Pfaff, WRL/PAC Chair: 608-488-4200
Susan Armacost, WRL/PAC Director: 414-778-5780 or toll free: 877-855-5007

Wisconsin Right to Life Political Action Committee
Presidential – U. S. Senate Endorsements

Top Election Priorities: Re-elect President Bush...Send Feingold Packing

(Milwaukee, WI): The Wisconsin Right to Life Political Action Committee today announced that it has endorsed President George W. Bush for re-election to the presidency and has endorsed Bob Welch, Russ Darrow and Tim Michels in the Republican primary for the U. S. Senate.

"President Bush wants to continue his work in upholding the sanctity of human life," said Bonnie Pfaff, Chair of the WRL/PAC. "It is imperative that the President be elected to a second term for the sake of the most vulnerable members of the human family."

Pfaff also stressed the importance of defeating radically pro-abortion Russ Feingold in the U. S. Senate race. "No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate. Senators not only vote on legislation affecting the sanctity of human life but they have the power to confirm or not confirm the President's judicial nominations. And it is in the U. S. Supreme Court where the fate of *Roe* v. *Wade* will ultimately be decided. We do

not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees."

In commenting on the three endorsed U. S. Senate candidates, Pfaff said, "Bob Welch has been a champion for the right to life cause during his distinguished political career in the state legislature. Time after time he has courageously fought for legislation that would enhance the dignity and sanctity of all human life. Bob Welch would take that same courage and determination with him to the U. S. Senate and continue his work on behalf of the unborn and other vulnerable individuals."

"Tim Michels and Russ Darrow would be extremely supportive of legislation that would enhance the dignity of all human life and they would oppose measures that would demean the sanctity of the human person," said Pfaff.

The three U.S. Senate candidates were extensively interviewed by the Wisconsin Right to Life Committee members and each returned the organization's federal candidate questionnaire which covers federal issues ranging from the protection of human embryos from unethical research, a ban on all human cloning, foreign aid for abortion, federal funding for abortion and a range of other key federal right to life issues.

In addition, the questionnaire asked the candidates if they would oppose a filibuster of a judicial nominee if that nominee receives a favorable or neutral-recommendation from the Senate Judiciary Committee. The three candidates all stated they would oppose a filibuster under those circumstances.

"Russ Feingold is so extreme in his anti-life position and the U. S. Senate is so important to the future of un-

born babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections" said Pfaff.

[FEC Exhibit 54]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO. 1:04CV01260 (DBS, RWR, RJL)
(THREE-JUDGE COURT)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
V.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 54 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

(excerpts)

BeFair.org.

Wisconsin Right to Life URGENT E-Alert
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

July 14, 2004

FILIBUSTERS BY FEINGOLD, KOHL
OF THE PRESIDENT'S JUDICIAL NOMINEES
MUST STOP!

The Courts are Crucial to the Right to Life Cause

Is it fair for Senators Feingold and Kohl to continually vote to filbuster the President's judicial nominees? You probably agree that the President's nominees deserve an up or down vote in a reasonable time frame. Yet, 16 out of 16 times over the past two years, Feingold and Kohl have voted to filibuster certain of the President's nominees. Seven of the votes were against Miguel Estrada, an individual who has worked in administrations of both parties, received a unanimous well-qualified rating by the American Bar Association, and would have been the first Latino to sit on the Court of Appeals for the District of Columbia. Estrada finally withdrew his nomination after waiting two years to be confirmed.

Feingold and Kohl are putting politics into the court system, creating gridlock, and costing taxpayers money.

In the upcoming months, votes on up to 25 judicial nominees will come before the U.S. Senate. Feingold and Kohl and their colleagues are likely to filibuster most or all of these nominees.

You can help! Because of the importance of the federal courts to the right to life cause, Wisconsin Right to Life urges you to e-mail or call Feingold and Kohl and urge them to be fair and allow an up or down vote on the President's judicial nominees. Tell them to stop filibustering and allow the court system to operate efficiently. Urge your friends and family to do the same.

Senator Russ Feingold
202-224-5323
russell.feingold@feingold.senate.gov

Senator Herb Kohl
202-224-5653
You must go to his web site and type in a message:
kohl.senate.gov/gen_contact.html

Barbara Lyons

From: PACMembers-owner@wrtl.org on behalf of Legislative [legis@wrtl.org]

Sent: Monday, July 26, 2004 4:58 pm

To: Legislative

Subject: Wisconsin Right to Life

BeFair.org.

Wisconsin Right to Life NEWS RELEASE
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

For release on Tuesday morning, July 27, 2004
Contact: Barbara Lyons, Executive Director
Susan Armacost, Legislative Director

WISCONSIN RIGHT TO LIFE SPEAKS OUT REGARDING JUDICIAL FILIBUSTERS AND MCCAIN-FEINGOLD RESTRICTIONS

WHAT: NEWS CONFERENCE

WHEN: Wednesday, July 28, 2004 10 a.m.
Assembly Parlor
State Capitol, Madison, WI

WHY: Wisconsin Right to Life (WRL), headquartered in Milwaukee, will announce an initiative of na-

tional significance to inform Wisconsin citizens regarding the participation of their Senators, Russ Feingold and Herb Kohl, in Democratic filibusters to block confirmation of judicial nominees. WRL will also announce steps it is taking to challenge the Bipartisan Campaign Reform Act (better known as the McCain-Feingold).

FAST FACTS:

- On 20 occasions since March of 2003, most of the Senate Democrats have voted to block confirmation of various judicial nominees.
- In the 215-year history of our country, a filibuster has blocked no judicial nominee—until now.
- The nominees are the most qualified of any recent administration, with 99 percent receiving qualified or well-qualified ratings from the American Bar Association (ABA). A well-qualified rating by the ABA was once considered a "gold" standard by Senate Democrats.
- Nominee Miguel Estrada withdrew his nomination after waiting two years to be confirmed and after seven attempts to break a filibuster over his nomination failed.
- McCain-Feingold, in part, restricts the rights of organizations to discuss issues of public concern and to conduct grassroots lobbying for favored legislation 30 days before a primary election, caucus, or convention of a political party, or 60 days before a general election.

NOTE: No advance interviews will be given. Visit our new website devoted exclusively to these issues at www.befair.org For other Wisconsin Right to Life issues, visit our general website at *www.wrtl.org.*

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Barbara Lyons

From: PACMembers-owner@wrtl.org on behalf of Wisconsin Right to Life [legis@wrtl.org]

Sent: Wednesday, March 16, 2005 11:54 AM

To: Wisconsin Right to Life

Subject: Judicial Fillibuster Alert!

BeFair.org.

A project of Wisconsin Right to Life
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

FILIBUSTERS OF JUDICIAL NOMINEES REAR UGLY HEAD ONCE AGAIN; STAKES COULDN'T BE HIGHER AS CONFIRMATION OF THOSE FILIBUSTERED LAST SESSION HEADS FOR A VOTE ON U.S. SENATE FLOOR

Fight is Prelude to the Potential Naming of a U.S. Supreme Court Nominee

The U.S. Senate is bracing for another high-stakes battle on President Bush's judicial nominees. Refusing to fold, the President has re-submitted the names of nominees who were filibustered in the last congressional session. Democratic Senators, including our own *Senators Feingold and Kohl*, are once again threatening to filibuster these nominees, forcing a 60 vote majority for confirmation rather than a normal majority.

Republican Senators have threatened to initiate what they call the "nuclear option" to dismantle the filibuster. They apparently have the votes to change Senate rules to prohibit the use of filibusters on judicial nominees. Democrats have threatened to completely tie up the work of the Senate if the Republicans adopt the nuclear option. All of this is a prelude to potential resignations to the U.S. Supreme Court and the enormous battle which is certain to be waged to confirm whoever is named.

ACTION NEEDED

Please contact Senators Kohl and Feingold and urge them to allow an up and down vote on ALL judicial nominees.

For more information on the filibusters and how to contact Senators Kohl and Feingold please visit www.befair.org. This is one of Wisconsin Right to Life's websites and is devoted entirely to the filibuster issue.

[FEC Exhibit 70]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 70 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

- BARBARA LYONS

FROM: PACMembers-owner@wrtl.org on behalf of Legislative [legis@wrtl.org]

SENT: Thursday, July 15, 2004 12:27 PM

TO: Legislative

SUBJECT: Wisconsin Right to Life E-Update

Wisconsin Right to Life E-Update
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

July 15, 2004

Items in this E-Update:

1. Fr. Frank Pavone (Priests for Life) Coming on Sept. 16 - Save the Date!
2. Candidate Information Can be Accessed on WRL Website
3. Reversal of *Roe* v. *Wade* is Possible *if* Pres. Bush is Re-elected
4. Tell Feingold/Kohl to Stop Filibustering the President's Judicial Nominees
5. H.R. 4682 (Federal Funding of Embryonic Stem Cell Research)

Father Frank Pavone Coming to Milwaukee and Green Bay on September 16!

For the first time in 20 years, the reversal of *Roe* v. *Wade* is a real possibility if our nation elects individuals

who cherish the sanctity of human life. Father Frank Pavone will be both in Green Bay and in Milwaukee at two exciting events. He wants to meet you and talk with you about the responsibility all of us have to vote and the importance of the pro-life issues in making our voting decisions. As a nationally-known advocate for the unborn and the founder and director of Priests for Life, you will not want to miss meeting Fr. Pavone! See details below rgarding both events.

Milwaukee Event with Father Pavone:

September 16, 2004—Varsity Theatre, Marquette University—7:30 to 9:00 p.m. Light refreshments will be served. Father Pavone's Milwaukee appearance is sponsored by Catholic Knights, Caritas for Children, Marquette Students for Life, Priests for Lfe and Wisconsin Right to Life. Music will be provided by Theiss and O'Conner. Refreshments will be served. Admission is free but donations will be gratefully accepted. Reservations accepted by phone only (toll free: 877-855-5007).

Green Bay Event With Father Pavone:

September 16, 2004 - 11:30 to 1:00 p.m. - Riverside Ballroom, 115 Newhall St. Admission is $10.00 which includes lunch. (Renowned Riverside Ballroom homemade chicken dumpling soup will be served with lunch). Father Pavone's Green Bay appearance is sponsored by Priests for Life and Wisconsin Right to Life. Reservations accepted by phone only (toll free: 877-855-5007).

Candidate Information Can Be accessed on the Wisconsin Right to Life Website

Don't know where candidates stand on right to life issues? Candidate information is only a click away by going to Wisconsin Right to Life website at www.wrtl.org. Currently, you can find the voting records for state and federal legislators by going to the WRL website and clicking on "Find Out How They Voted." Beginning on July 25, you will also find the complete list of Wisconsin Right to Life PAC endorsed candidates, both state and federal, by clicking on "Wisconsin Right to Life PAC Endorsed Candidates."

The Reversal of *Roe v. Wade* is a Real Possibility if President Bush is Re-elected and Radically Pro-Abortion U.S. Senators Like Russ and Feingold are Defeated!

For the first time in 20 years, the reversal of *Roe* v. *Wade* is a real possibility but it won't happen unless the president we elect on November 2, 2004 will nominate justices amenable to overturning *Roe*. The differences between President Bush and John Kerry couldn't be more stark when it comes to the right to life issues. John Kerry is so radical on the issue of abortion and has such disdain for the lives of unborn children that he even voted to keep partial-birth abortions legal and voted against the *Unborn Victims of Violence Act* (the Laci Peterson Law.) President Bush signed both of those important measures into law. John Kerry has also said that he would only appoint Supreme Court Justices who support the tragic *Roe* v. *Wade* decision.

The individuals who represent us in the U.S. Senate are also crucial to whether *Roe* v. *Wade* will be overturned because it is the U.S. Senate that must confirm

the President's judicial nominees. If Russ Feingold's past actions are any indication of how he would vote on the President's Supreme Court nominees, we can expect him to thwart each and every one of the President's Supreme Court nominees. When voting on other Bush nominees for other very important federal courts, Feingold has voted to filibuster those nominees 16 out of 16 times!

There are a number of Republican candidates running in the September primary and the candidate who wins the primary election will face Feingold in the November general election. Of the Republican candidates running, only three have a chance to win the primary and go on to challenge Feingold. They are State Senator Bob Welch, Russ Darrow and Tim Michels. All three of these fine candidates hae been endorsed by the Wisconsin Right to Life Political Action Committee (WRL/PAC) and WRL/PAC will vigorously support whichever of the 3 wins the primary. All three candidates have pledged to allow an up or down vote on the President's judicial nominees. In addition, they are all vigorously opposed to the destruction of human embryos for research purposes, they are opposed to all human cloning, they are opposed to funding abortion overseas and in our own country, and they all oppose *Roe* v. *Wade* and want unborn children protected. Russ Feingold has the opposite position on all of those issues! Russ Darrow does support rape and incest exceptions in very limited circumstances. While this not the position of Wisconsin Right to Life (WRL strongly opposes rape and incest exceptions), the stark contrast between Feingold and Darrow on right to life issues speaks for itself and WRL/PAC will strongly support Darrow if he is the winner of the primary.

Tell Feingold and Kohl to Stop Filibustering the President's Judicial Nominees

Both Feingold and Kohl have voted 16 out of 16 times to filibuster President Bush's judicial nominees for the very important federal courts. Seven of their votes were against Manual Estrada, who received a unanimous well-qualified rating from the American Bar Association. After two years of having his nomination stalled, this excellent nominee withdrew his name from consideration. It's just not fair! And there are approximately 25 additional judicial nominees who are expected to come before the U.S. Senate in the coming months.

The role the federal courts play in ruling on right to life issues is enormous! Some of the federal courts are extremely hostile to the right to life movement and those are the courts to which the Planned Parenthoods of the world go when they want right to life laws (like the Partial-Birth Abortion Ban Act of 2003) struck down.

Please contact Feingold and Kohl immediately and urge them, in the sense of fairness, to allow an up or down vote on each of those nominees! Please both call and e-mail them. Senator Feingold's phone number is 202-224-5323. You can e-mail him at: russell_feingold@feingold.senate.gov. Senator Kohl's phone number is 202-224-5653. To e-mail him you must do it by going to his website at http://kohl.senate.gov.

H.R. 4682 (Dealing with Federal Funding of Embryo Research)

Several people have contacted us regarding a federal bill offered by supporters of federal funding for destroying human embryos for research purposes (H.R. 4682). They evidently received information about this bill that

gave the impression that H.R. 4682 was proceeding through the U.S. House. This legislation was introduced on June 24 by Rep. Mike Castle (R-Del.) The day after the bill was introduced (June 25), House Speaker Dennis Hastert publicly announced that he would not allow the bill to go forward. H.R. 4682 has been dead since June 25.

In the very short term, this is good news. But the supporters of embryonic stem cell research will be looking for other legislative avenues to promote the federal funding of embryonic stem cell research, such as appropriations bills, etc. So, we must continue to be vigilant in expressing our strong opposition to the destruction of human embryos for research purposes. When you contact you members of congress about this issue, please tell them you oppose any legislative initiative whatsoever that would promote the destruction of human embryos for research purposes. That way, regardless of which legislative avenue is chosen by the promoters of embryonic research, all bases are covered. If we hear of a specific legislative initiative regarding this topic that is moving forward, we will immediately let you know.

If you don't know who your congressional representative is or you don't know how to contact them, just go to the Wisconsin Right to Life Legislative Information Center which can be accessed at the Wisconsin Right to Life website at www.wrtl.org. Then just click on "Legislative Information Center. Just follow the instructions to find out who your representative is and complete contact information for your representative will appear. You can even e-mail your representative directly from the WRL Legislative Information Center.

If you receive future communications from sources other than Wisconsin Right to Life or the National * * *.

[FEC Exhibit 73]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

Wisconsin Right to Life, Inc., plaintiff
v.
Federal Election Commission, defendant
and
Sen. John McCain, et al.,
intervenor-defendants

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 73 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

VOLUME 4, NUMBER 1 • SPRING 2004

LIFE WITHOUT LIMITS

The quarterly magazine of Wisconsin Right to Life

BORN ALIVE INFANT PROTECTION ACT BECOMES LAW

WHAT'S INSIDE? * * *

RADICALLY PRO-ABORTION FEINGOLD MUST GO!

U.S. SENATE WILL DETERMINE THE FATE OF MILLIONS OF UNBORN BABIES

[PHOTO OMITTED]

No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate.

United States Senators vote on legislation that affects the sanctity of the lives of the most vulnerable members of the human family. But U.S. Senators also vote to either confirm or not confirm the federal judicial nominees of the president. Currently, a number of President Bush's federal judicial nominees have been blocked by Bush's opponents from receiving a vote by the full Senate. One of the major reasons these nominees have been blocked is a fear on the part of the pro-abortion movement that the president's nominees would uphold pro-life laws.

But the real battle will be over nominees to the U.S. Supreme Court. If the pro-abortion crowd is worried about Bush's federal judicial nominees at lower levels, they are frantic regarding Supreme Court nominees. After all, if Bush is able to change the makeup of the Supreme Court, the reversal of *Roe* v. *Wade* becomes a real possibility!

Currently U.S. Senator Russ Feingold has maintained a 0% voting record on right-to-life issues. Feingold's defense of the gruesome partial-birth abortion procedure is legendary, particularly after he said that even if the baby were fully outside the mother's body, the woman should still have the right to decide if the baby should live or die. In addition, Feingold has been active in his opposition to Bush's judicial nominees and is expected to be particularly active in opposition to U.S. Supreme Court nominees.

The three major Republican U.S. candidates are State Senator Bob Welch, Tim Michels and Russ Darrow. Each of the candidates was interviewed by the Wisconsin Right to Life Political Action Committee. In addition, all three candidates returned the federal candidate questionnaire which covers federal issues ranging from the protection of human embryos from unethical research, the cloning of human embryos for research purposes, federal funding of abortion, foreign aid for abortion, euthanasia and other key federal right-to-life issues.

[PHOTO OMITTED]	[PHOTO OMITTED]	[PHOTO OMITTED]
Russ Darrow (R) Founder and of Head Russ Darrow Group	Tim Michels (R) Co-Owner and Vice President of Michels Corp., Brownsville, Wis.	Bob Welch (R) State Senator from Red-granite, Wis.

Darrow, Michels and Welch said they would oppose a filibuster of a judical nominee if that nominee receives a favorable or neutral recommendation from the Senate Judiciary Committee.

Regarding whether abortion should remain legal, Michels and Welch would oppose exceptions in cases of incest and forcible rape while Darrow would support those exceptions.

Russ Feingold is so extreme in his anti-life position and the U.S. Senate is so important to the future of unborn babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's pro-life community in the 2004 elections!

FEINGOLD MUST GO!

Authorized and paid for by the Wisconsin Right to Life PAC, Richard Fox, Treasurer. Not authorized by any candidate.

[PHOTO OMITTED]
Sen. Lazich

[PHOTO OMITTED]
Rep. Gundrum

Born Alive Infant Protection Act BecomesWisconsin Law

Sen. Mary Lazich (R-New Berlin).

The *Born Alive Infant Protection Act* clarifies that every baby born alive after an abortion has the same legal status under Wisconsin law as an infant born alive after a natural or induced delivery or a Caesarean section.

Dramatic testimony on behalf of the legislation earlier in the legislative session highlighted the need to enact a law that would protect survivors of abortion.

Rep. Gundrum and Sen. Lazich were dedicated in their resolve to have this legislation enacted into law when they learned of the atrocities inflicted on many babies who are born alive after being aborted.

"We are deeply appreciative of Rep. Gundrum, Sen. Lazich and the leadership of both houses of the state legislature," said Susan Armacost, Wisconsin Right to Life legislative director. "These legislators recognized the human rights abuses that were inflicted on many abortion survivors and were appalled by it! As a result, they moved swiftly to rectify the situation."

Did you know?

Wisconsin Right to Life has been the lead organization involved in the creation, promotion and enactment of all pro-life laws enacted in Wisconsin since the mid-1970s.

[FEC EXHIBIT 74]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 74 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

Volume 4, Number 2 • Summer 2004

LIFE Without Limits

The quarterly magazine of Wisconsin Right to Life

[PHOTO OMITTED]

President Bush was joined on the stage by six women and men who have lost both their daughters and their unborn grandchildren in violent crimes: Sharon Rocha and Ron Grantski (victims Laci and Conner); Carol and Buford Lyons (victims Ashley and Landon); Cynthia Warner (victims Heather Fliegelman and Jonah); and Stephanie Alberts (victims Christina and Ashley Nichole). Also present was Tracy Marciniak Seavers, who survived an assault that killed her unborn son, Zachariah. For more on Tracy's long journey to the White House bill-signing, see Page 3.

Nothing More Important:

Re-Electing Pro-Life President Bush
and Defeating Pro-Abortion Russ Feingold

The Stakes Have Never Been Higher for the Right-to-Life Cause!

The top election priorities for the Wisconsin Right-to-Life Political Action Committee (WRL/PAC) are to do all it can to deliver Wisconsin for our great pro-life President George W. Bush and to defeat radically pro-abortion U. S. Senator Russ Feingold.

This is not to say that congressional and state legislative races are not crucially important. Of course they are,

and the WRL/PAC will be heavily involved in those races.

But the presidential and U. S. Senate races rise to a top priority level in 2004 because for the first time in 20 years, the reversal of *Roe v. Wade* is a distinct possibility.

In order for *Roe* to be reversed, President Bush must be re-elected so he can nominate individuals to the U. S. Supreme Court who will rule to overturn the tragic decision that legalized abortion on demand throughout the United States. Pro-abortion Democratic presidential candidate John Kerry has stated that if he is elected, he will nominate *only* U. S. Supreme Court candidates who support *Roe v. Wade.* The distinction between Bush and Kerry couldn't be clearer!

RE-ELECTING PRO-LIFE PRESIDENT BUSH AND DEFEATING RUSS FEINGOLD

The U. S. Senate is responsible for voting to confirm or reject the President's judicial nominees. One of Wisconsin's current U. S. Senators, pro-abortion Russ Feingold, faces re-election in the 2004 elections. Feingold has done everything he can to thwart a number of the President's federal judicial nominees at lower court levels and this is only a preview of what Feingold and others would do to defeat President Bush's nominees to the U. S. Supreme Court. The right-to-life community in Wisconsin must do all it can to defeat Feingold and replace him with an individual who will consider President Bush's judicial nominees in a fair manner.

The stakes have never been higher for the right-to-life cause! If you would like to assist the WRL/PAC (WIsconsin Right to Life Political Action Committee) in helping to set the stage for a reversal of *Roe v. Wade,*

contact the Wisconsin Right to Life state office toll free at 877-855-5007.

President Bush Signs *Unborn Victims of Violence Act* into Law

Surrounded by parents and grandparents of those who died in two-victim crimes, President Bush, on April 1st, signed into law the *Unborn Victims of Violence Act*, also known as "Lacie & Conner's Law."

National Right to Life Legislative Director Douglas Johnson said that the (democratic candidate for president) "Senator John Kerry voted against Laci and Conner's Law, and if Kerry were president, today would be a veto ceremony, not a signing ceremony."

Which Republican U. S. Senate Candidate will Face Feingold in November?

The Wisconsin Right to Life Political Action Committee has endorsed three pro-life Republican U. S. Senate candidates who will face each other in the September 14, 2004 primary election. The winner of that primary will go on to face radically pro-abortion Democrat incumbent Russ Feingold in the November 2 general election.

The WRL/PAC endorsed U.S. Senate candidates are Bob Welch, Russ Darrow and Tim Michels. While other candidates may enter the race, one thing is clear . . . it will be Welch, Darrow or Michels who will win the primary and then face Feingold in the general election.

All three candidates would support key pieces of federal right-to-life legislation likely to be considered by the Congress in the next legislative session. Darrow would support rape and incest exceptions in limited circumstances. In addition, all three candidates pledged to al-

low a vote by the full Senate on judicial nominees that have received either a favorable or neutral rating by the Senate Judiciary Committee.

[PHOTO OMITTED]

Bob Welch currently serves in the Wisconsin State Senate and prior to his election to the Senate, he served in the State Assembly. Welch has been a courageous leader for the right-to-life cause throughout his distinguished legislative career.

[PHOTO OMITTED]

Russ Darrow told WRL/PAC "You have my word that I will use my pro-life stance as a compass for all legislative decisions that I would make in the U. S. Senate."

[PHOTO OMITTED]

Tim Michels said, "I am 100% pro-life and I will work to defend the lives of those who cannot defend themselves."

Whichever of these fine candidates should win the September primary election, the WRL/PAC is prepared to do all it can to assist the election of that candidate.

Life Without Limits. Summer 2004

[FEC Exhibit 78]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, 999 E. STREET, N.W., WASHINGTON, D.C. 20463, DEFENDANT

AND

SEN. JOHN MCCAIN ET AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 78 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1260 (DBS, RWR, RJL)
Three-Judge Court

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENORS-DEFENDANTS

PLAINTIFF WRTL'S RESPONSES TO DEFENDANTS' INTERROGATORIES

Pursuant to Federal Rule of Civil Procedure 33 and the Court's August 18, 2006 Order, Wisconsin Right to Life, Inc. ("WRTL") submits these Responses to *Defendant Federal Election Commission's and Intervenor-Defendants' Second Interrogatories* ("Interrogatories") served on WRTL.

Defendants' First Set of Interrogatories

5. Describe in detail the date, amount, and source of any donation of $1,000 or more (cash or in-kind) that WRTL has received since January 1, 2002 that was donated to support WRTL's grassroots lobbying efforts.

WRTL paid for the advertisement at issue here from its general fund and not a segregated account and

therefore it is the general fund account that will reflect, albeit in an unsegregated form, the funds used to support WRTL's grassroots lobbying efforts. WRTL does not have records of solicitations which segregate solicitations and/or responses for the 2004 advertisements from general funds. WRTL provides in response a document recording all the donations from 2002 until May of 2006 of $1,000 or greater received into its General Fund, identified by type of donor (individual, nonprofit corporation ("nonprofit") or business corporation ("corporate"). *See* Attached "*Contributions to General Fund*".

Defendants' Second Set of Interrogatories

1. Describe in detail WRTL's plans during the 2004 election cycle to expend $71,000 for the purpose of making independent expenditures, as stated in paragraph 10 of the affidavit of Barbara Lyons executed on August 9, 2004, in this case.

WRTL has already produced information as to its 2004 budget for WRTL PAC, and does not reproduce it here. As made clear in the testimony of Barbara Lyons and Susan Armacost, the plans of spending for independent expenditures are fluid and depend on amounts raised, and raising funds for independent expenditures by WRTL PAC is especially difficult. Therefore, no detailed plans for spending other than those mentioned in already-provided document or testimony exist.

2. Identify by name, address, and position held within WRTL, if any, each and every person that you may call upon to serve as a witness on behalf of WRTL in this matter and provide a synopsis of each person's expected testimony.

WRTL relies on the testimony of Barbara Lyons as submitted in the Amended Verified Complaint and her supplemental affidavit. WRTL relies on the testimony of Susan Armacost, Jason Vanderground, June Weiss, as to the intent, purpose, creation and broadcast of the ads at issue in this case and the testimony of experts Charles H. Franklin III and Douglas Bailey as to existence of genuine issue ads and grassroots lobbying and of their opinions of the nature of WRTL's ads. WRTL may call upon other witnesses as well.

3. Pursuant to Fed. R. Civ. P. 36(a), for each and every response to Defendants' First Requests for Admission that does not constitute an unqualified admission, please describe in full why WRTL cannot admit or deny the matter. For each and every response by WRTL to Defendants' First Requests for Admission that does not constitute an unqualified admission or denial because WRTL lacks adequate information with which to formulate an answer, please describe in full detail the "reasonable inquiry" that WRTL conducted in an effort to formulate an answer and why the information resulting from the reasonable inquiry is inadequate to permit WRTL to answer.

WRTL assumes that Defendants' meant the actual text of Fed. R. Civ. P. 36(a): "The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully *admit or deny* the matter." (Emphasis added). There are no instances that trigger this interrogatory.

4. With respect to the three broadcast advertisements appended to your Verified Complaint in this matter, identify each person who drafted, wrote,

edited, reviewed, or otherwise assisted in the design and creation of each advertisement, and for each person identified explain in detail the work the person did in connection with the drafting, writing, editing, review, or other assistance in the design and creation of each advertisement.

Insofar as the question pertains to the vendors who did the majority of the work on the ads, the requested information has already been provided. Insofar that the interrogatory asks for information about WRTL, WRTL states that the following persons at WRTL performed the respective tasks with regard to the advertisements appended to the Verified Complaint:

Barbara Lyons: comments, suggestions and approval of the advertisements overall.

5. Identify by name, address, and position held within WRTL, if any, each and every person who contributed any information to its answers or other responses to these interrogatories or who otherwise participated in the preparation of those answers and other responses.

In addition to legal counsel in this case, the additional persons who so participated are:

Barbara Lyons
WRTL Executive Director
10625 West North Ave., Suite LL
Milwaukee, WI 53226.

The following persons gathered information consulted in forming answers or other responses to these interrogatories and other responses:

Mary Phillips
WRTL Development Director
10625 West North Ave., Suite LL
Milwaukee, WI 53226

Susan Armacost
WRTL Legislative/PAC Director
10625 West North Ave., Suite LL
Milwaukee, WI 53226

6. With respect to the alleged grassroots lobbying campaign that WRTL conducted in July-August 2004 on the judicial filibuster issue, please itemize the amounts expended by WRTL to conduct each phase of that campaign, including but not limited to the planning and "concepting" of the campaign (as described by Barbara Lyons in her May 18, 2006 deposition), the creation and production of the broadcast advertisements, and the costs for the airtime for each advertisement that was actually aired in each of the three media markets used by WRTL.

WRTL provides the attached documents: *See* attached "Working Budgets for Special Initiative."

7. With respect to money that WRTL solicited for its alleged grassroots lobbying campaign concerning judicial filibusters, list: a) the total amount of money raised; b) the number of individual donors and the total amount that was raised from individual donors; c) the number of business corporation donors and the total amount that was raised from business corporations; d) the number of non-profit corporation donors and the total amount that was raised from non-profit corporations; e) the amount of each donation from an individual that was equal to or

greater than $5000; f) the amount of each donation from a business corporation that was equal to or greater than $5000 and, for each such donation, the name and address of the business corporation; and g) the amount of each donation from a non-profit corporation that was equal to or greater than $5000 and, for each such donation, the name and address of the non-profit corporation.

WRTL answers in accordance with the agreement of the parties and the court's August 18, 2006 order which limits identification of donors to whether they were individual, nonprofit or business corporation. WRTL does not have records of solicitations which segregate solicitations and/or responses for the 2004 advertisements from general funds. WRTL provides, in response to Defendants' First Set of Interrogatories #5, a document recording all the donations from 2002 until May of 2006 of $1,000 or greater received into its General Fund, identified by type of donor (individual, nonprofit corporation ("nonprofit") or business corporation ("corporate"). *See* Response to Defendants First Set of Interrogatories, Number 5, *supra*; *"Contributions to General Fund"*.

8. For each corporate donation to WRTL in 2004 that was equal to or greater than $10,000, list the name and address of the corporation, and the amount and date of each donation.

WRTL answers in accordance with the agreement of the parties and the court's August 18, 2006 order which limits identification of donors to whether they were individual, nonprofit or business corporation. WRTL provides, in response to Defendants' First Set of Interrogatories #5, a document recording all the donations

from 2002 until May of 2006 of $1,000 or greater received into its General Fund, identified by type of donor (individual, nonprofit corporation ("nonprofit") or business corporation ("corporate"). *See* Response to Defendants First Set of Interrogatories, Number 5, *supra; "Contribution to General Fund".*

Verification

I affirm under the penalties for perjury that the foregoing statements are true.

/s/ BARBARA L. LYONS
BARBARA L. LYONS

Date: 8/24/06

Barbara L. Lyons, WRTL Exec. Dir.

Respectfully submitted,

/s/ JAMES BOPP, JR.
JAMES BOPP, JR.

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Lead Counsel for Plaintiff

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$1,000.00	1/10/2002	Individual
$5,000.00	1/25/2002	Individual
$1,000.00	4/26/2002	Individual
$5,000.00	6/4/2002	Individual
$5,000.00	6/4/2002	Individual
$1,000.00	6/4/2002	Individual
$1,000.00	6/5/2002	Individual
$1,000.00	6/6/2002	Nonprofit
$20,000.00	6/11/2002	Individual
$1,000.00	6/11/2002	Individual
$1,000.00	6/19/2002	Individual
$1,000.00	6/28/2002	Individual
$1,000.00	7/19/2002	Individual
$1,981.00	7/23/2002	Individual
$1,000.00	7/24/2002	Individual
$1,500.00	7/26/2002	Nonprofit
$1,000.00	7/30/2002	Individual
$2,000.00	10/18/2002	Individual
$1,500.00	10/25/2002	Individual
$1,000.00	1/15/2003	Individual
$22,000.00	2/21/2003	Individual
$1,000.00	3/21/2003	Individual
$3,000.00	3/28/2003	Individual
$1,000.00	4/23/2003	Individual
$1,000.00	5/6/2003	Nonprofit
$1,000.00	6/19/2003	Individual

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$1,000.00	7/22/2003	Individual
$1,000.00	7/29/2003	Individual
$1,500.00	9/11/2003	Individual
$1,000.00	11/19/2003	Nonprofit
$1,500.00	11/26/2003	Nonprofit
$1,000.00	12/31/2003	Individual
$1,000.00	12/31/2003	Corporate
$1,000.00	12/31/2003	Individual
$1,000.00	1/23/2004	Individual
$1,800.00	1/28/2004	Nonprofit
$1,000.00	3/11/2004	Individual
$1,000.00	4/13/2004	Individual
$2,500.00	4/27/2004	Individual
$2,500.00	6/9/2004	Individual
$1,000.00	6/15/2004	Individual
$5,000.00	6/24/2004	Corporate
$2,500.00	7/6/2004	Individual
$11,367.86	7/13/2004	Individual
$2,000.00	7/14/2004	Nonprofit
$50,000.00	7/15/2004	Individual
$50,000.00	7/15/2004	Corporate
$5,000.00	7/26/2004	Corporate
$2,000.00	8/4/2004	Nonprofit
$5,000.00	8/6/2004	Individual
$20,000.00	8/13/2004	Individual
$10,000.00	8/25/2004	Individual

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$10,000.00	8/29/2004	Individual
$5,000.00	8/29/2004	Individual
$1,000.00	9/9/2004	Corporate
$50,000.00	9/9/2004	Corporate
$100,000.00	9/9/2004	Individual
$1,000.00	9/14/2004	Individual
$10,000.00	9/14/2004	Nonprofit
$5,000.00	9/15/2004	Individual
$1,000.00	9/17/2004	Nonprofit
$2,000.00	10/4/2004	Individual
$1,500.00	10/15/2004	Individual
$1,000.00	10/20/2004	Individual
$5,733.04	10/25/2004	Individual
$20,000.00	10/25/2004	Nonprofit
$25,000.00	10/29/2004	Individual
$1,000.00	11/3/2004	Individual
$10,000.00	11/6/2004	Corporate
$140,000.00	11/30/2004	Corporate
$1,000.00	12/7/2004	Nonprofit
$2,500.00	1/9/2005	Individual
$3,000.00	1/9/2005	Individual
$1,000.00	1/11/2005	Individual
$1,000.00	1/18/2005	Individual
$50,000.00	1/25/2005	Individual
$6,000.00	2/22/2025 [*sic*]	Individual
$1,500.00	4/8/2005	Individual

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$1,300.00	5/23/2005	Individual
$33,473.19	6/9/2005	Individual
$2,000.00	6/22/2005	Nonprofit
$1,000.00	7/1/2025 [*sic*]	Individual
$1,000.00	7/22/2005	Individual
$1,000.00	8/3/2005	Individual
$1,000.00	8/4/2005	Individual
$10,000.00	10/8/2005	Individual
$25,000.00	11/18/2005	Individual
$2,000.00	12/16/2005	Individual
$1,000.00	1/6/2006	Individual
$1,000.00	2/13/2006	Nonprofit
$1,600.00	3/6/2006	Individual
$1,000.00	3/16/2006	Individual
$1,000.00	4/26/2006	Corporate
$804,255.74		

Wisconsin Right to Life *Working Budgets for Special Initiative*

Component	Working Budget	Agency Fees	Outside Costs	Description
Statewide Survey	$18,000	$-	$18,000	Outside costs for research partner to prepare for, field, and analyze statewide phone survey.
Strategic Planning and Message Development	$20,000	$20,000	$-	Fees for conducting discovery, assisting with quantitative research, developing a strategic action plan, and creating a message matrix.
Creative Concepting/ Development	$30,000	$30,000	$-	Fees for concepting multiple TV/Radio commercials for each phase of the campaign.
Media Planning and Buying	$10,000	$5,500	$4,500	Fees for coordinating various media activities, trafficking materials to media outlets, and processing media invoices. Outside costs for media services involved in preparing a statewide media plan and executing the media buy.
Dedicated Website Development	$20,000	$10,000	$10,000	Fees for project/content management, creative direction, copy-writing, design, and activity/feedback reporting. Outside costs for interactive partner to register, build, and host the actual site
TV/Radio Production	$47,780	$9,160	$38,600	For producing anti-filibuster spots including: 1) "Waiting" TV; 2) "Wedding" Radio; and 3) "Loan" Radio.
Public Relations	$15,830	$2,500	$13,330	Fees for coordinating various PR activities. Outside costs for public relations partner to execute a national media relations campaign.
Media Costs	$210,129	$-	$210,129	First three weeks of media costs for anti-filibuster phase
IVR Calls	$12,000	$-	$12,000	Costs for placing 100,000 IVR phone calls.
Total	$373,739	$77,160	$306,559	

BEST AVAILABLE COPY

[FEC Exhibit 90]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN ET. AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 90 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

BeFair.org

FOR IMMEDIATE RELEASE:
Tuesday, August 17, 2004

CONTACT:
Barbara Lyons or
Susan Armacost
Wisconsin Right to Life
877-855-5007
blyons@wrtl.org
sarmacost@wrtl.org

James Bopp, Jr.
Bopp, Coleson & Bostrom
812-232-2434 (office)
812-243-0825 (cell)
jboppjr@aol.com

WISCONSIN RIGHT TO LIFE FILES APPEAL TODAY IN U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA TO PROTECT INTEGRITY OF GRASSROOTS LOBBYING

New radio ads point out outrageous assault on the freedom of speech-grassroots lobbying.

MILWAUKEE, WI—Wisconsin Right to Life (WRL) is filing an appeal today in the U.S. Court of Appeals for the District of Columbia, of the U.S. District Court for the District of Columbia's decision that denied a preliminary injunction to allow Wisconsin Right to Life to air its anti-filibuster radio and television ads beyond August 14. McCain-Feingold stipulates that broadcast advertising that mentions a candidate's name that is running for a federal office must cease 30 days before a primary election. Because the U.S. District Court failed to provide injunctive relief to Wisconsin Right to Life,

the ads stopped running at the end of the day on August 14.

"The appeal we are filing today is essential in order to protect the integrity of grassroots lobbying," said James Bopp, Jr., who is representing Wisconsin Right to Life. "Due to the McCain-Feingold law, we have not only lost our right to freely engage in political discourse regarding the actions of our elected officials, but we have lost our right to lobby them."

According to Barbara Lyons, Executive Director of Wisconsin Right to Life, because the organization's previously run ads are viewed as criminal activity by the Federal Election Commission (FEC) with possible hefty fines and prison sentences if they run past August 14, the organization has begun running a new radio ad campaign pointing out the outrageous assault on the Wisconsin Right to Life's freedom of speech and the right of citizens to be informed regarding the actions of their elected officials.

More

The text of the new radio ad, which is entitled "News Bulletin," is as follows:

"Due to recent legislative restrictions and government red tape, our regularly scheduled freedom of speech cannot be aired at this time.

Because of campaign finance reform, our anti-filibuster ads . . . the ones questioning the blocking of qualified judicial nominees from a simple "yes" or "no" vote . . . well, ads like these aren't allowed on the air as of August 15.

Does that seem fair to you?

More restrictions on free speech. Less information. Was that really the intent of campaign finance reform?

To find out more about what Washington says we can't say here, visit BeFair.org. That's BeFair.org.

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee."

All of the documents filed in the case, the previously run radio and television ads and the new radio ad as well as other information about the lawsuit are available online at Wisconsin Right to Life's website www.befair.org that is devoted to this issue. For all other information about Wisconsin Right to Life, visit the organization's general website at www.wrtl.org.

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BeFair.org

Wisconsin Right to Life URGENT E-ALERT
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

Tuesday, August 17, 2004

IMMEDIATE ACTION NEEDED!
YOU ARE NEEDED TO URGE FEINGOLD TO DEBATE

New Radio Ads Feature Assault on Free Speech to Do Grassroots Lobbying

Wisconsin Right to Life is appealing last week's lower court decision asking for permission to run our radio and television ads into the blackout period created by McCain-Feingold campaign finance reform.

The fight is not over! We are appealing the decision to the Court of Appeals for the District of Columbia. And, we are challenging Feingold to a debate over this assault on free speech.

Senator Feingold was quoted in the August 23 *Milwaukee Journal Sentinel* as saying that he is willing to talk about McCain-Feingold with this opponents. "I am happy to talk about it any at time and at any place," stated Feingold.

Please contact Senator Feingold and urge him to debate Wisconsin Right to Life Executive Director Barbara Lyons on the free speech restriction of McCain-Feingold as well as his filibustering of President Bush's judicial nominees. Please visit www.befair.org for a direct link to Senator Feingold's office.

Our new radio ad hits hard at the assault on free speech. You can hear the new ad and review all news releases and court documents at www.befair.org. which is Wisconsin Right to Life's website dedicated just to this issue. For other information about Wisconsin Right to Life, please visit our general website at

www.wrtl.org

Thank you!

[Exhibit 7]

Transcript of Deposition of Douglas L. Bailey
Exhibit 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN ET AL.,
INTERVENOR-DEFENDANTS

DEPOSITION OF DOUGLAS L. BAILEY

Tuesday, June 6, 2006
[Filed: June 23, 2006]

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* * * * *

[8] organized as a 527 while we ask the question.

Q. Right. I understand.

So the group would nominate candiates and place them on the ballot for president and vice president in 2008. That's the goal?

A. Yes, sir.

Q. And then would the group conduct a campaign around those nominees?

A. No, the nominees would conduct their campaign.

Q. All right. Who first contacted you about being an expert witness in this case?

A. Way back when, the answer is Fred Werthheimer.

Q. Thinking you are saying way back when, perhaps you are referring to the McConnell litigation?

A. Yes.

Q. Let's bring it forward a little bit. With respect to the Wisconsin Right to Life versus FEC litigation, you understand you are designated as an expert in that case?

[9]

A. I do understand that I've made a declaration in that case, yeah, that's right. And your question is?

Q. Who first contacted you about being an expert in Wisconsin Right to Life versus FEC?

A. Fred Werthheimer was the person who called me and asked would I have an interest in continuing the—I don't know that he used the term "dialogue," I would —in this case and I said sure.

Q. And when was that?

A. I'm not going to be good in time, dates. So, I can't answer that.

Q. Okay. Was it this year, 2006?

A. It seems to me, it seems to me that it was last year, but I don't really remember. I honestly don't remember.

Q. Now, after that conversation, who else have you talked to about being an expert in this case and about this case?

A. I've talked to, with Shane here and I've talked with some folks at the FEC.

Q. Have you discussed with them the substance * * *.

* * * * *

[11] not going to try to quote them because my memory is not that good, but the issue essentially is whether that type of ad, which some would call an issue ad and others would call a campaign ad, was appropriate in the midst of a campaign.

Q. You used two terms, "issue ad" and "campaign ad." Would you tell me how you—what you understand those to describe and how you distinguish between the two.

A. What I said was that some people call it an issue ad and some people call it a campaign ad. My view is that anything that is run in the midst of the campaign that is likely to have a political impact is a campaign aid. I don't mean that as a legal term, I just mean as a practical term. I think it is possible for a campaign ad by my definitions, campaign ad and an issue ad to be the same thing. It's possible to talk about issues in a campaign and try to have some impact on issues in the midst of a campaign. I won't try to define how other people see an issue ad.

Q. Right.

[12]

A. But my sense is an issue ad is something that is hopefully going to have an impact on issues. My point is, issue ads and campaign ads can be the same thing. I mean, an issue ad run in a campaign is a campaign ad.

Q. Okay. Again let me paraphrase you and tell me if I'm right or not. I think what you said was if you run an ad about a political issue, that it will have an effect, that it will have an effect on an election and should be considered to be a campaign ad. Is that what you are saying?

MR. HAJJAR: Objection, mischaracterizes the witness's testimony.

BY MR. BOPP:

Q. Go right ahead.

MR. HAJJAR: You can answer.

A. I don't understand the process here, when they object I'm—I know I'm supposed to be quiet but—

BY MR. BOPP:

Q. Right, during their—

THE WITNESS: Is there somebody who rules * * *.

* * * * *

[14]

THE WITNESS: And could I hear the objection, please.

(The record was read aloud as follows: "Objection, mischaracterizes the witness's testimony.")

A. Let me state it in my own words.

BY MR. BOPP:

Q. Please, that's what I asked you to do.

A. Anything—I'm not talking in legal terms now.

Q. Mm-hmm.

A. Anything that happens in the course of a campaign is, potentially has some impact on the campaign so that any ad run that relates to candidates or the issues in a campaign is going to have some impact on the campaign. It may have a little impact. It may have a big impact, but it's going to have some impact, and so in that sense any ad that is run that has impact on a campaign is, in my mind, a campaign ad. That's what I mean by the term "campaign ad" because it's going to have some impact on the campaign.

[15]

Q. And that would include ads that mention the names of the candidates and ads that do not mention the names of candidates?

A. Yes, from my standpoint. Again, not a legal term, it's just bound to have some impact on the campaign and it's campaign ad from my perspective.

Q. And you used the phrase prior, in a prior answer, "a political issue." What did you mean by "a political issue"? If the ad referred to a political issue, what did you mean by that?

A. Any issue that is related in any way to the offices that are on the ballot or the candidates that are on the ballot.

Q. You've referred to your declaration that you submitted in the McConnell case.

(Plaintiff's Deposition Exhibit Number 1 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 1. Now, to explain the format, this, I got this out of the joint appendix or some other [16] compilation of evidence that was submitted as part of the briefing in the Supreme Court because I could not locate your declaration that you signed, but would you examine this and tell me whether or not this is the text of the declaration that you submitted in the McConnell case?

MR. STANSBURY: Just so the record is clear, and I think you alluded to this, but the declaration that Mr. Bailey has is not signed.

MR. BOPP: What do you mean? This one? Exhibit 1?

MR. STANSBURY: Yeah, that this copy is not signed.

A. Since it isn't signed, I'm perfectly happy to read it from top to bottom. To tell you the truth—

BY MR. BOPP:

Q. If that's necessary then, please do.

A. To tell you the truth, I won't remember it exactly every word, but I will read it to see whether I agree with what I said then and assume that it is right. Let me take the time to read it.

[17]

(Witness reviews document.)

A. This certainly appears to be similar. I can't swear to it word-for-word, but it seems right.

BY MR. BOPP:

Q. Okay. Thank you.

Now, do you recall that this case, Wisconsin Right to Life versus Federal Election Commission, was before the U.S. Supreme Court previously?

A. I am here in relation to my experience in politics. I don't know this case. I don't know—I'm not here as a lawyer. I don't understand the legal history and I haven't spent a lot of time trying to figure out the legal history.

Q. Before you were contacted to do your declaration for this case, were you involved in the Wisconsin case?

A. Not to my knowledge.

(Plaintiff's Deposition Exhibit Number 2 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as * * *.

* * * * *

[19] me, if it's necessary to correct the record on that, I'm happy to do so.

Q. Is Exhibit 2 a copy of that brief?

A. Well, once again, I'm going to presume that it is. I wouldn't know of any reason why you wouldn't give me what I actually provided so I would presume that it is. Without reading it, and even if I read it, I wouldn't necessarily remember every paragraph and word.

Q. Who contacted you about submitting a brief in the U.S. Supreme Court such as Exhibit 2?

A. I think I've answered that question. Fred Wertheimer talked to me as to whether I would be willing to participate in this case, in a continuation, in essence, of my participation in the McConnell case, which is the way I view it.

Q. Randall Dryer is listed as counsel, your counsel. Do you know him?

A. I know him on the phone.

Q. Okay. You talked to him

A. Yes.

Q. Okay. What did you pay him for the filing * * *.

* * * * *

[29]

A. Page 2, got you.

Q. Your declaration. At Paragraph 3 it says: "I also have extensive experience consulting with various citizens' initiatives and other grassroots issue campaigns. For example, I've advised, among others, Handgun Control, Inc., Floridians Against Casinos, and League of Conservation Voters."

Let's start, I guess, with Handgun Control. When did you represent them or consult with them?

A. I consulted with them on a pro bono basis virtually from the inception of the organization—now you are really testing my memory—in the '70s.

Q. And through what period of time?

A. Through much of the '80s and even into the early '90s and an occasional meeting since then, but it wasn't a contractual arrangement, so they would call me occasionally to seek guidance and thoughts and so forth.

Q. And what kind of subjects would they consult with you?

A. General strategy on the issue how to [30] communicate the issue to the public at large, how to seek public support for their positions. General strategic advice and occasionally in terms of some advertising, advertising for the issue, to shape public opinion as opposed to having impact on campaigns.

Q. Were there occasions when they were involved in grassroots lobbying that you consulted with them?

A. If by grassroots lobbying you mean reaching the public, to reach the public officials in some way, the answer is no. In a more broad sense, again, I'm not using legal definitions, I'm just using my own part of the communications effort of any such organization, has some grassroots lobbying, my term, grassroots lobbying impact if you are trying to build the membership, if you are trying to build the understanding of the issue among the public without necessarily causing them to take any specific actions.

Q. Well, let's use your definition of grassroots lobbying, which is—and again, I'm [31] paraphrasing, and you put it in your own words if I'm inaccurate, the—where there are public communications by the group to the general public with a message to, urging them to contact appropriate governmental officials to take certain action such as vote for a bill or vote against a bill?

A. Did you describe that as my definition?

Q. That's what I just understood you to say as your definition. If I'm not correct, would you give it to me.

A. That is not correct.

Q. What I was saying is that in my term, you could call grassroots lobbying the building of an organization of supporters who subsequently might be asked to contact, but the building of that grassroots organization is another form of grassroots lobbying. In my mind, they are sort of part and parcel of the same thing in the sense that if you don't build the organization, then you have no organization to call on. My recommendations and [32] consulting for the group related to how do you build the organization, how do you grow the members.

Q. Well, let's come up with a word, so that we'll understand each other, for this specific kinds of advertising that are public communications to the general public, or portions of it, and then are asking them to contact governmental officials such as legislators to vote for or against a particular bill or to take some public action. What do you want to call that, that kind of advertising?

A. Let's call it public lobbying advertising.

Q. Okay. Good. So your recollection is that you did not consult with Handgun Control, Inc. about public lobbying advertising. Is that right?

A. That's correct, I don't remember any conversations about that, although it was always sort of implied that, at times, the organization was going to do that. But I didn't participate in developing those ads or in recommending them.

Q. Did they engage in that sort of advertising, that is, public lobbying advertising?

A. I'm trying to think of cases. Frankly I [33] suspect that they did, but I don't remember. There were undoubtedly particular instances where there were bills before the Congress where they did some of that. I was not involved in it.

Q. Now, with respect to Floridians Against Casinos, what was your consulting with that group, what was the nature—

A. That's really a different kind of issue altogether, where there was a ballot issue on the ballot in Florida to permit casino gambling, and so there was a campaign waged for or against, in our case against that ballot issue. It's a different kind of thing altogether. It didn't involve legislature in any way.

Q. The League of Conservation Voters, what was your relationship with them or what did you consult with them on?

A. That, again, was a personal pro bono relationship because a friend was the head of the organization and he sought my views on a variety of issues. More in the first

category, more in the handgun control category, where how do you broaden [34] the membership of the organization, what are the issues, what's the phraseology that can expand the membership. I don't remember any instance where I was involved in advising them or working with them on any, on any advertising for them.

Q. Okay. Have you consulted with any group specifically on public lobbying advertising or any person?

MR. HAJJAR: Objection, compound.

THE WITNESS: I'm sorry.

MR. HAJJAR: I objected that there are actually two questions to this question. If you understand it, you can answer.

A. Now I don't even remember it. I'm sorry.

MR. BOPP: Would you repeat it, please.

(The record was read aloud as follows: "QUESTION: Have you consulted with any group specifically on public lobbying advertising or any person?")

A. I think the answer to that is no. I'm just trying to, I'm trying to recall any instance when we ever did any public—what was the phrase?

[35]

BY MR. BOPP:

Q. Public lobbying advertising.

A. Public lobbying advertising. No, by my definition, I did a good deal of grassroots organization-building

kind of work and some advertising of that sort, not public issue—

Q. Public lobbying advertising?

A. Public lobbying. I'm going to write it down.

Q. I had to. When is public lobbying advertising customarily done?

A. For the most part, I think it happens when a bill or a matter or an issue is directly before the Congress and it tends to be when votes are scheduled so that the week before it varies, but that's my—it's not my experience in the sense of having done it, but that's clearly when it happens.

Q. Okay. Now, does such advertising customarily mention the names of particular office holders that they are being—that the public is being asked to lobby?

A. In some instances it does. Often it does [36] not. I think increasingly it does. It's targeted in particular districts or particular states.

Q. And why would they, such advertising mention the names of specific office holders?

A. Well, if it's in advance of an issue, generally, it's because that office holder is either undecided on the issue or it is taking on a position and you want the public to weigh in with them to cause them to take the other issue.

Q. Now, turn to page 6 of your report—your declaration, I'm sorry—Paragraph 15. You mention that your work in Florida regarding Floridians against gambling involved a ballot measure?

A. Right.

Q. Okay. And so there would be no necessity or even no reason to mention candidates or office holders in that context. Is that right?

A. In that campaign, absolutely no reason at all.

(Plaintiff's Deposition Exhibit Number 4 was marked for identification.)

[37]

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 4. And let me describe the exhibit for you. The lower right-hand corner there is an identification—well, these are six—it's the story books for six ads. Do you know what a story book for an ad is?

A. Storyboard.

Q. Storyboard. See, you know better than me. Storyboard for an ad, do you know what that is?

A. Yeah.

Q. And this has in the lower right-hand corner identification of each ad that we have GIA Number 1, then GIA Number 2, GIA Number 3, now, GIA Number 4, as you can see, has 15 storyboards on one page. And the next page is a transcription of the words under each storyboard because of the difficulty even though not impossibility of reading the thing. So that is identified as GIA Number 4 script. Then we have GIA Number 5 and GIA Number 6. And GIA Number 6, there are two pages. The first page has nine storyboards for that ad

and the second [38] page, 2 of 2, has the final five. Right?

A. Mm-hmm.

Q. Now, for the record, these are the ads that are contained in Appendix J of the expert witness report of Goldstein in the McConnell litigation. So I would like for you to review this exhibit, read the text under each one of these storyboards so that you will get a sense of what is said in these various ads as reflected in this exhibit.

A. Okay.

(Witness reviews document.)

A. Okay.

BY MR. BOPP:

Q. Now, I'd like to show you what's been marked as Exhibit 5.

(Plaintiff's Deposition Exhibit Number 5 was marked for identification.)

BY MR. BOPP:

Q. Exhibit 6.

(Plaintiff's Deposition Exhibit Number 6 was marked for identification.)

[39]

BY MR. BOPP:

Q. And Exhibit 7.

(Plaintiff's Deposition Exhibit Number 7 was marked for identification.)

BY MR. BOPP:

Q. And I'd like for you to review those as well.

(Witness reviews documents.)

A. Yes, sir.

BY MR. BOPP:

Q. I want you to assume as to all of these ads, there's nine ads total here, that they were to be broadcast within 30 days of a primary or 60 days after general election?

A. First, with respect to Exhibit 4, do you have an opinion on whether those ads would influence an election?

A. They are all campaign ads. My definition, again, of campaign ads is something inevitably going to have some impact, maybe a little, maybe a lot, on an election that is in process, sure.

[40]

Q. All right. Now I want to compare the ads in Exhibit 4 and the ads, the three ads, Exhibit 5, 6 and 7, and is there any material difference in the message or how the message is conveyed between the ads in Exhibit 4 and the ads, Exhibit 5, 6 and 7 in your opinion?

MR. HAJJAR: Objection, vague.

THE WITNESS: I'm sorry.

MR. HAJJAR: I objected that I thought the question was vague. Once again, if you can answer the question, go ahead.

A. Yes, I think there's a difference. And my answer might surprise you in the sense that I think 5, 6 and 7 are probably more effective campaign ads.

BY MR. BOPP:

Q. In what way?

A. Because they are not so obvious, even though to anybody experienced with the business, it's reasonably obvious what the intent is. The point is that most of the ads in Exhibit 4 are sort of sledgehammer. And Exhibits 5, 6 and 7 are a little more subtle. But obviously they are campaign [41] ads.

BY MR. BOPP:

Q. Now, let's turn to Exhibit, in Exhibit 4, let's turn to the last ad GIA Number 6.

A. Yes.

Q. Are there any material differnece in content and specific—yeah, any material differences in content in your opinion between that ad and, let's say, Exhbit 5?

MR. HAJJAR: I just want to note for the record that page 1 of 2 on GIA Number 76 storyboards themselves are very grainy and very difficult to make out the images.

MR. BOPP: Okay. You are aware this will be attached to the deposition?

MR. HAJJAR: Yes.

MR. BOPP: Okay.

A. Let me make a general point. It may be a professional occupational hazard that I'm going to express, but television is called television because of the vision side of it. So among other things, on some of these ads you can't even see from the [42] storyboard what the pictures area. And in terms of Exhibit 5 there, is, in fact, no storyboard, so . . .

One of the interesting things about television advertising is that the pictures are often even more powerful than the words, but nonetheless you are here asking, I think, to focus on the words.

BY MR. BOPP:

Q. Yes.

A. I think there's a difference between the two ads. It's the same difference that I expressed before. One is a little more subtle and, therefore, probably more effective in that it does not categorically state with a sledgehammer what the position of the public officials are, but there isn't any question that during the period of a campaign, it is a campaign ad and would perhaps have more impact than the other one.

Q. Now, you referred to one difference, I think.

A. Right.

Q. GIA Number 6 does state the position of [43] the two senators being referenced in the ad on the matter, that is, it says: "Your senators, Russ Feingold and Herb Kohl, voted to continue this grizzly procedure." And there's no similar statement in Exhbiit 5, the position of senators Feingold and Kohl, on the filibuster. Right?

A. That's correct, but I'm going to add that the importance of understanding what a campaign ad is, my term, not a legal term, is that an ad run in the midst of a campaign has an impact. Senator Feingold is one of the two candidates, one of the two people mentioned that's on the ballot and the other one is not. Then the impact of running the ad in the midst of the campaign, implying, as this ad does, what their position is, has enormous—could have, could have, it might have no impact, but could have substantial impact on the election itself.

Q. When you are saying "implying their position," you are referring to Exhibit 5?

A. Yes.

Q. Okay. Now, isn't it true that groups often do public lobbying advertising—one [44] circumstance when a group might do or individuals might do public lobbying advertising is when the position of the office holder is undecided?

A. Correct.

Q. Okay. So isn't this ad consistent also with the proposition that these two senators' positions might be, or one or more of them, might be undecided?

A. But it's presented by an organization which is, which has already stated its opposition to Senator Feingold's opposition to this, so of course not.

Q. Is that said in this ad?

A. No, neither is the phone number. I mean, this is a campaign ad, Mr. Bopp. It is obvious it is a campaign ad.

Q. But you don't mind if I ask you details about it, do you?

A. Both in terms of its timing, its content and it's obvious intent.

Q. Now, would you answer my question.

A. Sure.

[45]

Q. My question was isn't it also true that the way, that what is said in this ad is perfectly consistent with the proposition that the position of one or more of the senators might have been undecided?

A. But is wasn't.

Q. Isn't the ad, the text of the ad consistent with the proposition that the position might be undecided?

A. I'm sorry, I can't—I really can't answer that question. I'm a—my business is politics. I look at an ad and I think I understand the ad. This is a campaign ad.

Q. Do you have a problem with reading the text of the ad?

A. When I read the text of the ad?

Q. Do you have a problem with your ability to read the text of the ad?

A. No, I don't.

Q. Do you have a problem with your ability to understand what the ad says?

A. Not in the slightest.

[46]

Q. Okay. So I'm asking you about your own testimony. Your own testimony was that public lobbying advertising is done in some instances when the person being lobbied, their position is undecided?

A. What has that got to do with this?

Q. So my question is: Isn't—there's, A nothing in the text of the ad that says vote for, vote against these candidates. Right?

A. Yes, there is.

Q. Okay. Where is that? What words are those?

A. Those words are the entire ad. That's what the ad says. That's why the ad is being run.

Q. Is this just simply a mind-reading episode by your? Are you psychic?

MR. HAJJAR: Objection, argumentative.

A. No, but, you know, experience has some value perhaps, both in the law and in the advertising world. And when this ad is run in the campaign by an organization that has already criticized these senators for taking a position that [47] they've taken, then it's a campaign ad. Of course it's a campaign ad. I mean, I don't understand even what the argument is.

BY MR. BOPP:

Q. Is Exhibit GIA number 6 found on Exhibit 4?

A. I'm sorry.

Q. Yeah.

A. Yeah.

Q. Is that a public lobbying advertising—advertisement, the way you have defined it?

A. The way I have defined it, I think clearly is is.

Q. With respect to Exhibit Number 5, is that ad a public lobbying advertisement by your definition, Exhibit Number 5?

A. Yes, and, remember, please, that my definition is not a legal definition. And a public lobbying advertisement can be a campaign ad.

Q. With respect to Exhibit 6?

A. Sorry, got you.

Q. Is that radio ad a public lobbying [48] advertisement as you have defined it?

A. Yes, I think so.

Q. With respect to Number 7, is that a public lobbying advertisement as you have defined it?

A. Yes, I think so. Wait a minute. Let me read it. I'm answering too quickly.

Q. Sure, please do.

A. Yes.

Q. Now, you've also stated that public lobbying advertisements are run when a particular office holder has a position on an issue or a bill, and the attempt is to persuade them to change that position. Is that right?

A. Sure.

Q. Is that kind of effort successful?

MR. STANSBURY: Objection, vague.

A. It can be. Generally, frankly, it's not, but it can be.

(Plaintiff's Deposition Exhibit Number 8 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as [49] Exhibit 8. Would you review that, please.

(Witness reviews document.)

A. Okay.

BY MR. BOPP:

Q. Now, let's assume for purposes of this hypothetical that Bill Yellowtail is a candidate for office and that this ad with this text is to be run within 30 days of a primary or 60 days of a general election. Is this ad a public lobbying ad, advertisement, as you have defined it?

A. I wouldn't know how to describe this. If this is an ad, this is trash, so is Bill Yellowtail a member of Congress?

Q. Let's assume for the purpose of the hypothetical that, yes, Bill Yellowtail is a member of Congress.

A. Frankly, I don't see this because I don't think it's tied to anything.

Q. You don't see it as a public—

A. I see it as trash.

Q. Okay. Is it a public lobbying advertisement as you've defined it?

[50]

A. On the face of it, I wouldn't call it that, but I don't know what is relates to. It may be within the context of something that is going on in the Congress right now to which these words may apply, and in that sense it could be, but I don't see it as that because it certainly isn't very specific.

Q. Would you view this, if broadcast, as we have described, as I have posited, within 30 days of a primary or 60 days of a general election as a campaign ad as you have characterized or defined it?

A. Well, of course, it's a campaign ad.

Q. Now, I want you to—

A. I want to remind both of us that public lobbying advertising can be public lobbying advertising by my definition, but if run within a campaign period, it is a campaign ad. We do understand that I'm not drawing a distinction between the two. A public advertising, public lobbying ad run in a campaign period is a campaign ad.

Q. Now, I want you to pull out Exhibit 5 [51] again.

A. Okay.

A. Are there any distinctions in your view between the text of Exhibit 5 and the text of Exhibit 8, are there any differences in the content and how the candidate and issues are presented?

A. Sure.

Q. And what are those?

A. Exhibit 8 is trash and Exhibit C is a little more specific and very much more subtle and probably more effective.

Q. So can you—could you specify the differences in the content that leads you to those conclusions?

A. Both are, in my mind, campaign ads and the Yellowtail, let's call it Exhibit 8, the Yellowtail ad is so over the top that it is not likely, without knowing more about the context, it's not likely to be effective. People would sort of grimace and walk away.

Exhibit 5 is not off-putting. It is subtle. Implies the position of the candidates or [52] of the candidate, and is, therefore, more likely to be effective communications, campaign communications.

Q. Now, isn't it true that Exhibit 5 references a specific legislative matter, where Exhibit—that is going to occur in the future, where Exhibit 8 does not?

A. Exhibit 8 certainly doesn't, and Exhibit 5 references something that has happened in the past and might happen in the future. Yes, it is more specific.

Q. Now, with respect to reference to the candidate involved, isn't it true that Exhibit 5 only references a clearly identified federal candidate with a statement urging the public to contact the candidate and to ask that he take a particular position on a legislative matter, where Exhibit 8 has many more references with respect to the character and integrity of the candidate?

A. Yeah, I think that Exhibit 5 is a more effective campaign ad.

Q. Well, but if you could answer my question [53] specifically.

A. Part of my problem is that I don't know who Bill Yellowtail is, I don't know the content of this and so forth. It doesn't make a whole lot of sense to me, but ask the question again, I'll try to answer it.

MR. BOPP: Would you repeat the question, please.

> (The record was read aloud as follows: QUESTION: Now, with respect to reference to the candidate involved, isn't it true that Exhibit 5 only references a clearly identified federal candidate with a statement urging the public to contact the candidate and to ask that he take a particular position on a legislative matter, where Exhibit 8 has many more references with respect to the character and integrity of the candidate?")

A. Well, in fact Exhibit 5 does not identify either of the people mentioned as a candidate, so I'm not sure I do agree with your question. But let [54] me say it in my own words. Clearly Exhibit 5 is more specific, is more precise, is less flamboyant, and relates to a more specific issue.

BY MR. BOPP:

Q. Isn't it true that Exhibit 5 contains no reference to the candidate here. Feingold, character, qualifications or fitness for office, where Exhibit 8 does?

A. That's correct.

Q. Isn't it true that Exhibit 5 contains no words that promoted, supported, attacked or opposed the candidate, Feingold, where Exhibit 8 does.

MR. HAJJAR: Objection, calls for a legal conclusion.

A. I think that's generally correct.

(Plaintiff's Deposition Exhibit Number 9 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 9. Now, would you review the text of this radio ad, please.

(Witness reviews document.)

[55]

A. Yes.

BY MR. BOPP:

Q. Does this ad, Exhibit 9, qualify as a public lobbying advertisement in accordance with your definition?

A. I think it does.

Q. If we posit that, assume as part of the hypothetical that this ad were to run, be run within 30 days of a primary or 60 days of a general election and that in this case Senator Kohl was a candidate for reelection and, therefore, we have a reference to a candidate. Would this be a campaign ad in accordance with your definition?

A. Yes, I think it would.

Q. And why is that?

A. I think ads that raise issues in relation to candidates, regardless of which side of the issue, they raise issues in relation to candidates are putting in the minds of voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad.

Q. Now, you mentioned in your testimony that [56] you believe that Senators Kohl and Feingold were supporting the filibuster and, therefore, would be opposing ending the filibuster. Is that your testimony?

A. Well, it's my understanding from the Wisconsin Right to Life web site that they were opposing the filibuster.

Q. Now, after the running of Exhibit 9, there was a vote on the Alito nomination where there was a vote to, for cloture so that there would be no filibuster. Are you aware of how Senators Feingold and Kohl voted in that instance?

A. Personally, no.

Q. Are you aware of the fact that Senator Kohl voted for cloture and against the filibuster?

A. No.

Q. And since that time in May, there was, Kavanaugh was on the floor of the senate for confirmation, Brent Kavanaugh, for the D.C. Circuit, and there was a vote for cloture in order to prevent a filibuster of that nomination. Do you know how Senators Feingold and Kohl voted then?

[57]

A. No.

Q. Are you aware of the fact that Senator Kohl voted for cloture and therefore against any filibuster in that case.

A. No.

Q. Now, if each of those--if that was true that Senator Kohl voted in the way I've described in the Alito nomination and the Kavanaugh nomination, that would reflect a change in this position as to the filibuster generally, wouldn't it?

A. I can't answer that. I don't know that that's true, but I assume it's true.

MR. BOPP: All right. I have no further questions.

MR. HAJJAR: Can we take a break?

MR. BOPP: Please do.

(Recess taken 11:34 a.m. to 11:50 a.m.)

MR. HAJJAR: We have no questions.

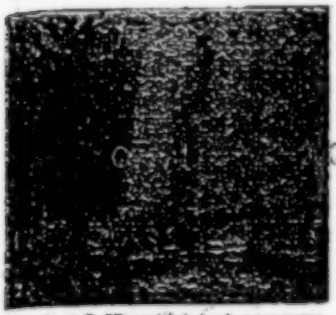
(Signature having not been waived, the deposition of DOUGLAS L. BAILEY was concluded at 11:50 a.m.)

[Exhibit 8]

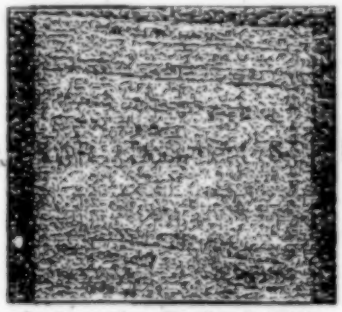
Exhibit 4 from Deposition of Douglas L. Bailey
Exhibit 8

[Filed: June 23, 2006]

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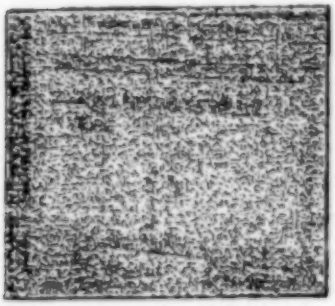
[Graduate]: "Dear high tech company, I'd like to send you my resume." [Announcer 1]: Dear Graduate, sorry, Congress is going to give your job to



a foreign worker. [Graduate]: "But I've just finished four hard years of technical studies."



[Announcer 1]: Sorry, besides foreign workers will work for a lot less. [Announcer 2]: Is this any way to



treat American workers? But based on her record, Congresswoman Northrup is likely to vote



in favor of the Foreign Worker Bill. Call Congresswoman Northrup and tell her to save



our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill.



This message paid for by the Coalition for the Future American Worker.

EXHIBIT 4
Deponent
Date Rptr

GIA
II 1

160

CMR

Ad Detector

BRAND: POL-CONGRESS+

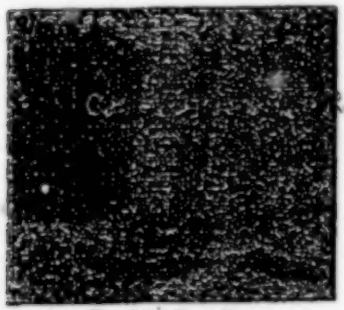
TITLE: FAIR/A Latham Foreign Worker Bill

COMMERCIAL: FAIR/A Latham Foreign Worker Bill 1 of 1

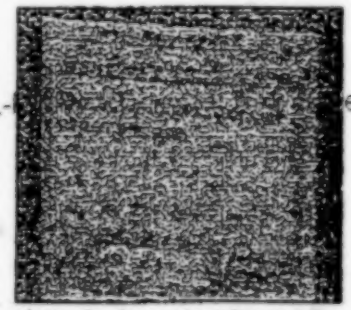
LENGTH: 30

FRAMES: 7

CMAG REPORTS



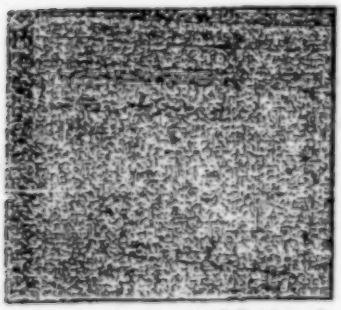
[Man1]: "Dear High Tech Company: I'd like to send you my resume." [Man2]: " Dear Graduate: Sorry, Congress is going to give your



job to a foreign worker." [Man1]: "But, I've just finished working four hard years of technical studies."



[Man2]: "Sorry, besides, foreign workers will work for a lot less." [Announcer]: Is this any way



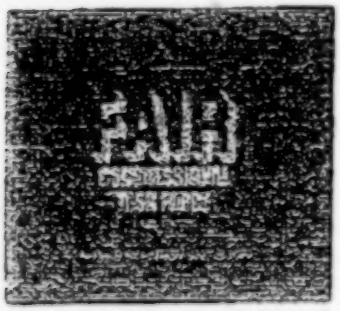
to treat American worker? But based on his record, Congressman Tom Latham is likely



to vote in favor of the Foreign Worker bill. Call Congressman Latham and tell him to save



our best jobs for American workers. Ask him to vote no on our Foreign Worker bill.



[PFB FAIR Congressional Task Force]

CJH
4/2

CMR

Ad Detector

BRAND: POL-CONGRESS+

TITLE: UT/COC Matheson Can't Decide Rx

COMMERCIAL: UT/COC Matheson Can't Decide Rx 1 of 1

LENGTH: 30

FRAMES: 7

CMAG REPORTS

Case 1:01-cv-01260-RJL-JMR Document 76-3 Filed 08/23/2004 Page 4 of 5



[Announcer]: Jim Matheson can't decide what position to take on prescription drug coverage for seniors.



He doesn't support the common sense plan passed by the House of Representatives.



He doesn't support Bill Clinton's big government plan. Tell Jim Matheson



a big government plan is the wrong way to go. It gives seniors



no choice, and it could cause millions of seniors to lose the coverage



they already have. Tell Jim Mathson to make a decision.



This issue is too important to ignore.
[PFB: US Chamber of Commerce]

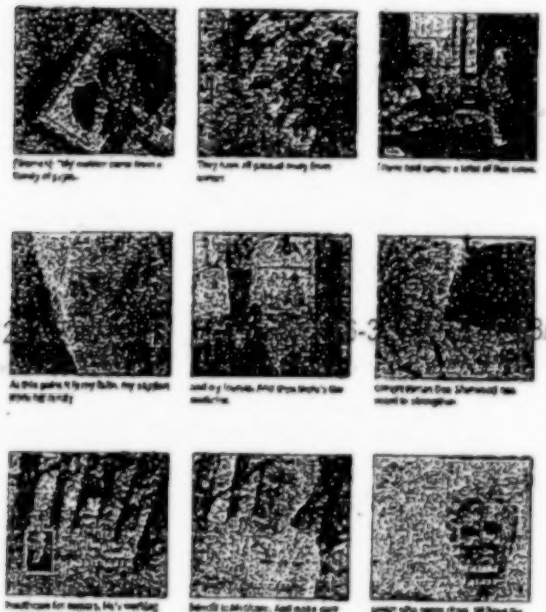
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162

CMR

Ad Detector

CMAG REPORTS

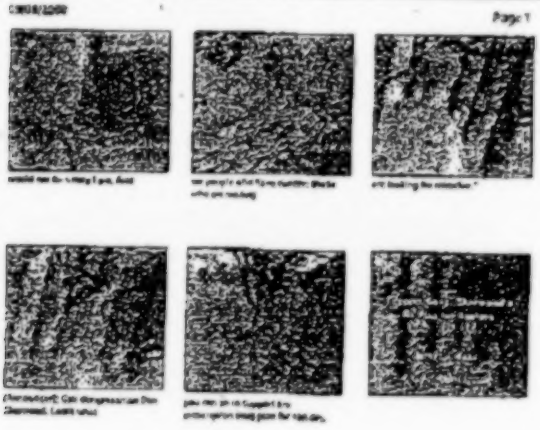


Competitive Media Analysis Group
212-545-7160
www.cmagroup.com

CMR

Ad Detector

CMAG REPORTS



Competitive Media Analysis Group
212-545-7160

C.J A
D U

Script for Citizens/Better Medicare

[Worried]: "My mother came from a family of eight They all passed away from cancer. I have had cancer five times. At this point, it is my faith, my support from family and friends. And then there's the medicare [*sic*].

Congressman Don Sherwood has voted to strengthen healthcare for seniors. He's working to add prescription drug benefit to Medicare. And make sure medicines are available for every senior who needs them. Without the medicine, I would not be where I am. And we people who have cancer, those who are waiting are looking for miracles."

[Announcer]: Call Congressman Don Sherwood. Learn what you can do to support his prescription drug plan for seniors.

[GIA #4 Script]

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[Woman 1]: "Like a lot of people I admire Jim Langevin, but when it comes to the issues that we



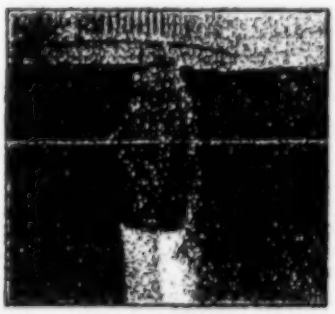
care about he just doesn't understand." [Woman 2]: "His record is clear,



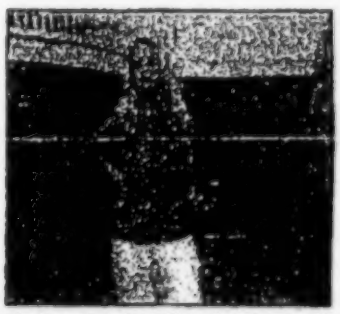
Jim Langevin voted to end a woman's right to choose and now



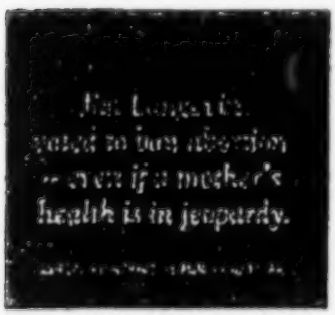
he's trying to confuse the issue and trying to confuse us." [Woman 3]: "Our health and



privacy are at risk and they're too important for us to be anything but sure.



Jim Langevin isn't listening to us and he sure isn't leading."

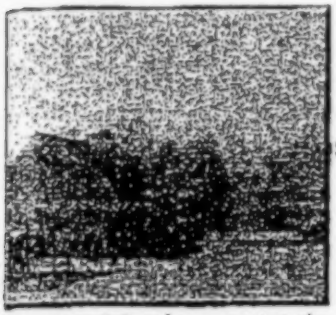


[Woman 2]: "Call Jim Langevin, tell him he can't take away our rights."

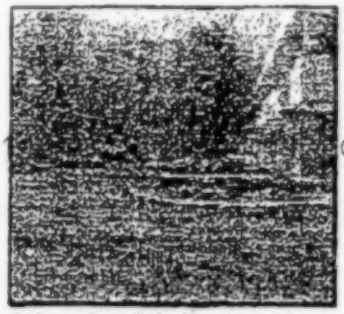


{PFB: Rhode Island Women Voters}

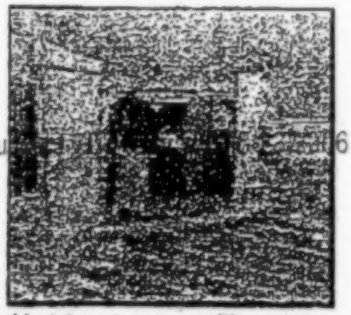
GTA #5



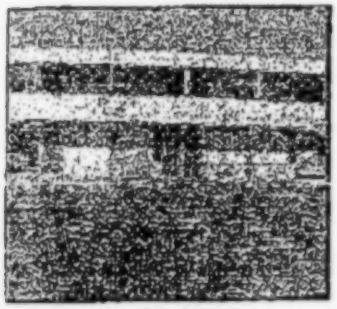
[Announcer]: America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed of



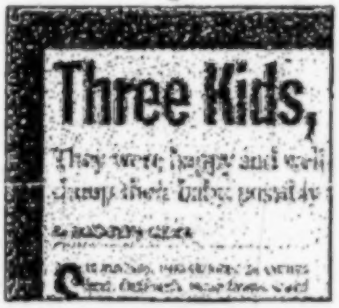
their newborn baby in a dumpster. Most Americans couldn't believe that



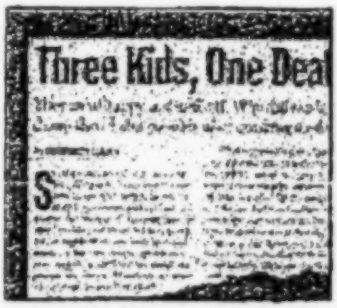
this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor



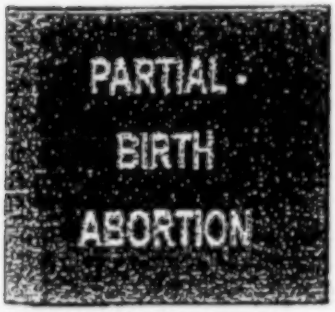
had been present that day in Delaware and delivered the infant, all but one inch from full



birth and then killed him it would have been perfectly legal.



Instead of murder or manslaughter, it would have been called a partial-birth abortion.



Killing late in the third trimester, killing just inches away



from full birth. Partial-birth abortion puts a violent death on thousands of babies

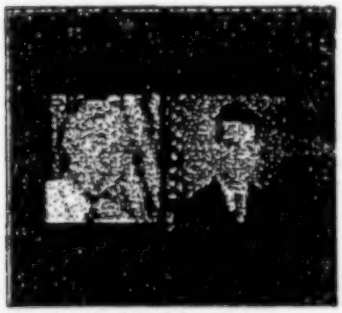


every year. Your Senators, Russ Feingold and Herb Kohl

GIH
#1
1 of 2

166
Page 3

AC07821ES8



voted to continue this grizzly procedure. Contact Senators



Feingold and Kohl today and insist they change their vote and oppose



partial birth abortion. Their number in Washington is 202-224-3121.





[PFB· Members of the National Pro-Life Alliance]

1:0- Documen Page 4 167

[Exhibit 14]

Transcript of Deposition of
Charles H. Franklin, III
Exhibit 14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. :1:04cv01260

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENING DEFENDANTS

DEPOSITION OF CHARLES H. FRANKLIN, III, PH.D.

Monday, June 5, 2006
[Filed: June 23, 2006]

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* * * * *

[7]

* * * * *

BY MR. BOPP:

Q. State your full name, please.

A. Charles Hicks Franklin, III.

Q. And with whom are you employed?

A. The University of Wisconsin.

Q. And in what capacity?

A. I'm a professor of political science.

Q. This deposition is being taken by agreement, and thank you for agreeing to come to D.C. and accommodating all the lawyers here. And you've been designated as an expert witness in Wisconsin Right to Life versus Federal Election Commission. Are you aware of that?

A. Yes.

Q. Now, the designation specifies that your anticipated subject matter testimony is as follows:

It is currently anticipated that Professor Franklin's testimony will generally address the [8] following subjects: 1, the impact of the broadcast advertisements identifying candidates on campaigns for elective office; 2, the alleged need to identify office holders and grassroots lobbying advertising; 3, an overview of the 2004 Wisconsin Senate campaigns including the role of the judicial filibuster issue; 4, the likely impact of Wisconsin Right to Life's proposed advertisements had they been run in the 2004 Wisconsin pre-election environment; 5, the effect that aggressors' lobbying exception like the one Wisconsin Right to Life seeks would likely have in future electoral contests; and 6, any other relevant matters relating to advertising and election.

Then the final statement in the notice is defendants reserve the right to alter the subjects of Professor Franklin's testimony relevant to the matters raised in this case.

Now, at this point in time are those six subjects that have been—that were specified, are those—is that the extent the subject matter of your expert testimony you expect to give? And if * * *.

* * * * *

[22] 225. What is the—do you know how many hours you've spent so far on this project?

A. I haven't totalled it up yet.

Q. Approximately?

A. It's somewhere in the order of a hundred hours.

(Plaintiff's Deposition Exhibit Number 1 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Plaintiff's Exhibit 1 and ask you if you can identify that?

A. This is the report I submitted to the FEC.

Q. Is this your final report?

A. Yes, it is.

Q. And do you anticipate preparing any further reports?

A. I do not.

(Plaintiff's Deposition Exhibit Number 2 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as * * *.

* * * * *

[25]

(Witness reviews document.)

A. Yes. This appears to be the packet of what I called unlabelled information that was sent to me by the FEC.

BY MR. BOPP:

Q. Okay. Now, included in this are newspaper articles, and you cite newspaper articles in your report. Correct?

A. That's correct.

Q. Is it customary and appropriate for experts in your field to rely upon newspaper reports of items?

A. Yes.

Q. Why is that?

A. Because in talking about political matters, the public discussion of those things are the things that most citizens and most non-insiders are exposed to.

Q. In your report you appear to credit the truthfulness of reports that are, you cite from newspaper articles. Is that customary and appropriate within your area of specialty?

[26]

A. Yes, within limits.

Q. And what are those limits?

A. Reports of the dates at which things happened, at least a press conference being held, for example, and in general statements that were made in public forums that are quoted, I think,would be routinely accepted. Matters of more opinion or interpretation, I think, in my field would be viewed as just that, so an editorial would not be given credit, credence as a factual statement.

Q. But a news report would?

A. Again, within these limits.

Q. Okay. Now, going back to the advertising that you consulted of the two groups for and against the filibuster issue that we referred to previously, the $5 million and 3.5 approximately, and you mentioned you looked at those, the text of some or whatever of the ads. What period of time is it your recollection that those, that advertisement was being run?

A. I believe they started in late March and * * *.

* * * * *

[28]

A. With the understanding that I can't quote it directly.

Q. Right.

A. My summary would be on the pro-filibuster side was the argument that the Democrats should have the right to block judges they considered too radical, too extreme, and also connected with that, that the minority in Congress should have some ability to prevent a majority from always having its way. On the antifilibuster side, the argument primarily was simple fairness

requires an up or down vote and that by blocking the President's highly qualified nominees, the Democrats were standing in the way of judicial positions that needed to be filled and that simple fairness demanded be filled.

Q. Were these ads designed to affect or influence the vote in the Senate on the filibuster issue in your opinion?

A. Some of them clearly were, some may have been more aimed at public opinion generally, but I think it would be fair to say that at least a significant number of them were aimed at that.

Q. And those that were directed or aimed at influencing the vote, what characteristics did they have that made you conclude that they were directed at that purpose?

A. They mentioned a specific senator by name, pointed to his role or her role in the debate. At least according to National Journal, they were also at broadcasts primarily in the States where those senators were from.

Q. What were the characteristics of the ads that you viewed their purpose to be to affect the general issue?

MR. DEELEY: Objection, mischaracterized the testimony.

BY MR. BOPP:

Q. Would you characterize it if I've rephrased it in a way that's inaccurate. The second group that you identified.

A. There were ads that said the nominees deserve an up or down vote. I'm sorry, I don't recall whether they also said this is hurting the * * *.

* * * * *

[31] them. The second page affecting the general issue.

A. The ones that did not—

Q. Okay. What would you like to call those, the second group? You can say B.

A. Shall we call them the ads that did not mention an office holder?

Q. Okay.

A. And now I'm going to have to ask you to repeat the question.

Q. Sure. With respect to the ads that did not mention an office holder, would you characterize, correct me if I'm wrong at any time, were to influence the issue generally, is that sort of advertising helpful in, when you are trying to influence votes in Congress?

A. It can be.

Q. When can it be and when wouldn't it be?

A. Those advertisements should be expected to raise the salience of the issue among the public and possibly to change or shift public opinion on that issue. And so to that extent, simply raising public concern and awareness of an issue could have the [32] effect of also influencing those who pay attention to public opinion, so, yes, in that sense they could.

Q. In what respect would they not be helpful in attempting to influence votes in Congress?

MR. DEELEY: Objection, assumes facts not in evidence.

BY MR. BOPP:

Q. You said they can be. So I assume that there's some aspect of this.

A. To the extent that they do not directly identify or point to an elected official and ask that citizens contact that official, it would be reasonable to assume that they have less direct lobbying or effect by contacting than if they simply discussed the issue and take a position on the issue.

* * * * *

Q. Now, some would characterize this, the activity you've just described between these two groups advertising on the filibuster issue, as grassroots lobbying efforts. Are you familiar with that phrase?

* * * * *

[34] categories.

Q. Let's explore that for a minute. You are familiar with the phrase "issue advertising"?

A. Yes.

Q. Now, how would you define that?

A. This is where the vagueness comes in, of course. An issue advertisement, in the broad sense that I use the term, and intended in the report as well, is any

advertising by a group, usually not a candidate or a political party, but which discusses an issue, usually takes a position on the issue, and may or may not imply something or say something about candidates or office holders' positions on that issue. So when I use the term "issue advertising," I mean it in that relatively broad sense. And it's in that sense that these things that we could also call grassroots lobbying are, in my broader terminology, equally well thought of as issue ads.

Q. Would it also be true that the phrase as you define it of "issue advocacy" is broader than [35] what you understand grassroots lobbying to be?

A. To the extent that a grassroots lobbying only implies a connection to a particular office holder, then I think that would be a definitional distinction between the two.

Q. Is it fair to say that grassroots lobbying is, based on your definitions, a subcategory of issue advocacy—or issue ads?

A. Yes, in the sense that I'm using it here and in the report, I think of them as closely linked and that grassroots lobbying, again, for the most part, would be a subcategory of issue ads.

Q. When you are researching the filibuster issue and you found these two campaigns being conducted by these groups on the filibuster issue that we've just been talking about, are you familiar with other groups doing grassroots lobbying on issues about upcoming votes in Congress?

A. Yes.

Q. And when you say you are familiar, what do you mean by that?

A. I mean that I'm aware that such things [36] happen. I have not done a scholarly investigation of such things myself, so I don't have detailed expert knowledge of specific campaigns of that sort.

(Plaintiff's Deposition Exhibit Number was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 4. And would you review that document which, I believe, defines various terms associated with lobbying and other forms of advocacy.

(Witness reviews document.)

MR. DEELEY: I object to the document to the extent it's, a margin is cut off.

A. Okay.

BY MR. BOPP:

Q. Now, I'll refer you to page 2 of the exhibit at the bottom, and there's the heading: Grassroots Lobbying. And then it says: Key indicators of grassroots lobbying. And there's three bullets points: Relates to specific legislation, reflects a point of view on the legislation's merits, encourage general public to * * *.

* * * * *

[39]

Q. Now, are you—is grassroots lobbying, at least on occasion, tied to upcoming votes in Congress?

A. Yes.

Q. Now, are you familiar with the fact that Congress is often in session in the fall of election years including within 60 days of an election?

A. Yes.

Q. And are you familiar with grassroots lobbying campaigns having been conducted during that period of time to influence an upcoming vote in Congress?

A. I'm not specifically familiar with that.

Q. Would you be surprised or would that be incompatible with your experience that such campaigns would be conducted in that time period?

* * * * *

A. In the past, before these issues before us came up, it certainly is plausible that it would have happened, and I simply don't know of specific cases.

(Plaintiff's Deposition Exhibit Number 5 * * *.

* * * * *

[42] to take action through the identification of this legislator, but that's my reading of the words here.

BY MR. BOPP:

Q. Do you agree with that statement, not from a legal standpoint but from an ad design standpoint?

MR. O'NEIL: Same objections.

A. I really don't know.

BY MR. BOPP:

Q. Do you agree with that statement as it relates to how grassroots lobbying is conducted?

MR. DEELEY: Same objections.

A. To the extent that this communication that, identifies the position of a legislator, then I would say that that is likely to encourage recipients of that communication to become more aware of the issue and to link it to the legislator more. That, I think I would say.

Q. Would you agree that organizations that want to influence government policy often engage in grass-roots lobbying?

A. Yes.

Q. As a means to influence current office * * *.

* * * * *

[45]

Q. Okay.

(Witness reviews documents.)

A. Done.

BY MR. BOPP:

Q. Good. Would you agree that Exhibits 6 through 13 are newspaper articles reporting on grassroots lobbying efforts by specific organizations and their purported—reporting on their purported success in influencing the government on what public policies they would adopt?

MR. DEELEY: Objection, compound and vague.

A. I wasn't aware they were newspaper articles. And could you restate the rest of it.

BY MR. BOPP:

Q. Okay. You notice the, for instance on Exhibit 6 at the bottom, find articles is the web site.

MR. BOPP: Would you repeat the question for me, please.

> (The record was read aloud as follows: "QUESTION: Would you agree that Exhibits [46] 6 through 13 are newspaper articles reporting on grass-roots lobbying efforts by specific organizations and their—reporting on their purported success in influencing the government on what public policies they would adopt?")

MR. DEELEY: I also object as outside the scope of the expert testimony.

A. They appear to be.

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibits 14 through 16.

> (Plaintiff's Deposition Exhibit Numbers 14 through 16 were marked for identification.)

MR. BOPP: Go ahead and put these up here, keep them—

THE WITNESS: Okay. I was just trying to keep them straight in my mind about which ones are which. So you want me to review these as well; is that correct?

BY MR. BOPP: Yes, Exhibit 14 through 16.

[47]

MR. DEELEY: Are you okay as far as water and—

THE WITNESS: Yeah, I'm good.

MR. DEELEY: —everything?

(Witness reviews documents.)

A. There's also some truncation on the right of the Exhibit 16.

BY MR. BOPP:

Q. Thank you.

A. Okay.

Q. And with respect to Exhibits 14, 15 and 16, would you agree that these are web pages reporting on, reporting by organizations on their specific grassroots lobbying efforts?

MR. DEELEY: Objection—are you done with the question?

MR. BOPP: Mm-hmm.

MR. DEELEY: Vague, compound and outside the scope of the expert testimony.

A. They appear to be. Some of them look more like web pages than others, but I agree that they are reporting on their efforts.

[48]

(Plaintiff's Deposition Exhibit Number was marked for identification.)

BY MR. BOPP:

Q. I show you what's been marked as Exhibit 17.

A. This is also truncated on the right.

(Witness reviews document.)

BY MR. BOPP:

Q. With respect to Exhibit 17, would you agree that this exhibit purports to be a press release from Senator Charles Schumer of New York wherein he is kicking off a grassroots lobbying effort to influence governmental action, specifically the U.S. Postal Service Stamp Advisory Committee, with respect to a certain proposal?

MR. DEELEY: Objection, compound, vague, and the document speaks for itself and outside the scope of the expert testimony.

A. Yes.

BY MR. BOPP:

Q. Number 18.

(Plaintiff's Deposition Exhibit Number 18 * * *.

* * * * *

[53] them you can have the question in mind, maybe that will be helpful. And my question would be: Do these exhibits, 18 through 24, appear to be web pages from various organizations encouraging their supporters to engage in grassroots lobbying regarding issues that are of concern to that organization?")

MR. DEELEY: I renew my objections that I've previously stated.

A. Yes, among other things.

BY MR. BOPP:

Q. Now, if you were—let's start with this. I understand your testimony that you have not done a research project on the involvement of organizations and grassroots lobbying?

A. That's correct.

Q. Now, if you were to conduct such a study would articles that appear in the Journal of Politics be the types of articles that would be viewed by you as a reliable authority within your area of expertise?

[54]

A. I wouldn't use the word "authority," but the Journal of Politics is a very reputable professional journal, yes.

Q. Within your area of expertise?

A. Yes.

(Plaintiff's Deposition Exhibit Number 28 was marked for identification.)

BY MR. BOPP:

Q. I show you what's been marked as Exhibit 28, and my question is: Would you agree that this purports to be an article from the Journal of Politics, entitled "Interest Niches and Policy Bandwagons Pattern of Interest Group Involvement in National Politics"?

A. Yes.

Q. In reviewing your resume, you appear to be identified often as an expert in polling.

A. Yes.

Q. And what is that area of expertise?

A. Broadly, political polling, or public opinion polling more generally, sampling questionnaire design, analysis.

* * * * *

[62] web site visited May 31st, 2006, which lists the members of the team. It says "Meet the Team," and you are not listed as a member?

MR. DEELEY: Objection, compound and the document speaks for itself.

A. That's correct.

BY MR. BOPP:

Q. Would you agree that the work of the Wisconsin Advertising Project is a reliable authority that would be relied upon by those in the field?

MR. DEELEY: Objection, vague.

BY MR. BOPP:

Q. Field of expertise?

A. Yes.

Q. Are you aware—well, before I do that, let's go back to your report, Exhibit 1.

Is it fair to summarize your report that the discussion of public policy issues can affect an election?

A. Yes.

Q. Now, that is true even if particular [63] candidates or public officials are not identified in the discussion?

A. Yes. You are using the term "discussion" in what sense?

Q. Public communications.

A. Yes I agree.

Q. And that the degree of effect on an election cannot be determined by the examination of the communication itself?

A. By the words on the page from the script, I would agree with that.

Q. Partially because the effect of a particular communication is influenced—is affected by other communications in the environment. Is that true?

A. Yes, I would agree with that.

Q. And that as long as it's a public communication, that is, a communication to members of the public through some means, it can have an effect on the election that it's not dependent on the mode of communication?

A. The effect would surely vary across modes [64] and exposure, repetition, but public communication of this sort certainly can have these effects.

Q. Can have an effect on an election?

A. (Nodding head.)

Q. So, in other words, telemarketing, in other words, phone calls, or newspaper advertising or direct mail or web site information or radio and television advertising,

or for that matter, discussions on radio talk shows or news broadcasts or, in other words, all of—the fact that all communication could affect an election, it's not dependent by which of those modes of communication because all of them could affect—a communication through any of those modes could affect an election. Is that right?

MR. DEELEY: Objection, compound and vague.

A. I would say it's an empirical question what the effects are across different modes, intensities, and so on, but in principle, any of them have effects. Without empirical research, it's difficult to say how much any one of [65] them would.

BY MR. BOPP:

Q. And that includes communications that don't mention candidates or public office holders can have an effect on election through any of those modes of communication?

A. A communication that deals with politically relevant issues need not mention the candidates in order to have an electorally relevant impact.

Q. Let's turn to page 8 of your report. Now, page 8 reports on three press releases by a Senator Bob Welch. It reports on a November 18th article in the Milwaukee Journal Sentinel. It reports on a press release by Wisconsin Right to Life.

Am I missing anything in terms of the modes of communication that you are reporting on here?

A. No, in this particular section those are the ones that I'm talking about.

Q. What else did you find in your research in terms of the discussion of the filibuster issue in * * *.

* * * * *

[72] affecting public officials. Wisconsin Right to Life is also broadly available or involved in legislative issues and their members are surely part of that. I did not do research on specific acts of mobilization by them. I'm reporting more the Wisconsin Right to Life's discussion of their grassroots organization.

Q. Now, I assume you've been made aware as part of your preparation of your expert report that Wisconsin Right to Life used its advertising as grassroots lobbying about affecting votes in the U.S. Senate on the filibuster issue. Is that right?

A. That's correct.

Q. Okay.

A. Well—

Q. That that is their position?

A. Actually, as I understand it, which is based on reading their releases, the documents that we have in front of us, they characterize the advertising campaign as about this issue about that. They also connected it with the issue of challenging the BCRA restrictions, and so I wouldn't say it was a single purpose as described by them in the [73] documents that I read, but it has at least the dual purposes of the grassroots lobbying as well as the opportunity to challenge the restrictions, or the regulation, I should say.

Q. If you were aware that Wisconsin Right to Life viewed this, at least in part, this advertising campaign, as a grassroots lobbying campaign about affecting upcoming votes in Congress, why did you not research the grassroots lobbying efforts of Wisconsin Right to Life generally or specifically?

A. I saw that as outside of the questions that I was asked to address. I was asked to address the broad role of, or the broad context of the 2004 election and to situate Wisconsin Right to Life within that and within Wisconsin politics. And I did that in a general way citing the information that was available to me. I don't know how I would do a scientific study at this point retrospectively of their mobilization efforts. That seemed far beyond what could reasonably be done in a report of this nature.

Q. Were you asked to do a research—to [74] opine on the question—were you asked to opine on the question of the effectiveness of grass roots lobbying in influencing votes in Congress when that lobbying campaign is directed at that, for that purpose or at that activity?

A. I was not asked to do that.

Q. Have you ever done that?

A. No.

Q. Why weren't you asked to do that?

MR. DEELEY: Objection, calls for speculation.

A. I wouldn't have any way of knowing.

BY MR. BOPP:

Q. Did anybody tell you why, why—to ignore the lobbying question?

A. No, no one told me to ignore the lobbying question. The issue didn't come up.

Q. Why did you think it was not relevant?

MR. DEELEY: Objection, assumes facts not in evidence.

A. I was asked to comment on the role of advertising and its likely effects in this case. I [75] was not asked to review the literature on grassroots lobbying, and so I did not.

BY MR. BOPP: Likely effects on what?

A. I'm sorry. Likely effects of what on what?

Q. In your answer, you just said: I was asked to review the likely effects. And my question is, the likely effects of what on what?

A. Okay. The effects of advertising on elections generally, the effects of what we would expect or believe based on the empirical literature, the effects of advertisements such as the Wisconsin Right to Life advertisements might be expected to have on an election.

Q. But you are not asked and you did not decide to opine on the question of what effect these advertisements would have on their efforts to influence votes in Congress?

MR. DEELEY: Objection, compound.

A. No.

BY MR. BOPP:

[76]

Q. In describing or in sort of summarizing your report, you mention that the public communications on an issue could affect an election but the degree of effect, the amount of effect is dependent on what? I know you've identified a whole series of things in your report. So what would be the critical features, factors?

A. Part of the question is an empirical one, meaning it can't be answered a priori of what makes one ad effective and another not, so I'm going to set that aside.

In terms of the impact that ads have on voters, important areas are characteristics of the voters, how attentive they are to politics. Other characteristics of the voters, their predispositions, partisan or ideological, those are the most prominent. And those affect or influence the extent to which voters are, in the first place, exposed to advertising and, secondly, the extent to which they accept the message of the ad conditional on them having been exposed to the ad.

Those are things which have effects as * * *.

* * * * *

[81] "QUESTION: But having a competing message will adversely affect the persuasiveness, if you will, or the effect of one message because you won't have as big an effect on voting behavior if you have competing messages, as I understand your report. Is that correct?")

A. No.

BY MR. BOPP:

Q. Okay. How would you say it then?

A. What competing messages do is raise the salience for partisans on both sides. So what it would mean is that—can we just call them pro and anti, for the sake of simplicity?

Q. Mm-hmm.

A. The people who are predisposed to the pro side can be stimulated, can become more, find the issue more salient as a result of messages from either side of the debate, okay? And so the implication is that in a high stimulus case with two sets of competing messages, partisan predisposition should be enhanced and so potential supporters of [82] the pro side are, in fact, more likely to absorb the pro message, incorporate it and become more aligned on that basis even in the presence of competing anti messages.

Now, the net effect is likely to be reduced. In a one-sided communication, everything is pushing you this way, and especially the less involved and less partisan people, who are really the people that move the most, if they are only exposed to a one-sided message, they will be carried along by that message more, whereas with competing two-sided messages, they'll get both and the effects will tend to cancel one another out.

Q. What effect does timing have on voting behavior in an election?

MR. DEELEY: Objection, vague.

A. Do you mean timing before the election, the number of days before the election day?

BY MR. BOPP:

Q. Yeah, timing of the message beforehand.

A. The empirical evidence seems to demonstrate that advertising that's closer to [83] election day has larger effects on shifting either vote preferences or actual vote counts. There is, in the first place, a sizable proportion of undecided voters up through election day in most contests. They are available for persuasion. And the evidence that's cited in the report finds empirically that in the latter stages of the election, the impact of advertising seems to increase in its effect on vote choice and vote preferences.

Q. I recall you cited a study regarding two weeks prior to the election.

A. Yes.

Q. All right? Are there studies that go—that examine the ultimate effect of messages in a time period greater than two weeks?

A. I have not found in the literature anything that addresses other time scales, so I'm not aware of research that specifically addresses any arbitrary point before that.

Q. Okay. How about messages that are two and a half months before an election?

[84]

A. I know of no direct evidence on that.

Q. Two months before an election, do you know of any—

A. No.

Q. —evidence or studies?

A. No, I don't.

Q. One month before an election?

MR. DEELEY: Objection, asked and answered.

A. To the extent that the Johnston book that's cited in here does look at the impact of advertising over the entire course of the campaign coming up to election day, they find that advertising continuously updates voters' preferences, and so the effect of past advertising sets the level that you are starting from but the effects of advertising in this week then moves you up and down relative to that.

So based on their empirical evidence, the implication would be that earlier advertising had a effect and helped push the level to a particular point but then subsequent advertising moves that. [85] In other words, there's not a long-term persistence of the earlier ads, they get—they set the stage, if you will, for this week's ads, which then move you up and down relative to that. So they are an argument for both a continuous effect of advertising throughout the campaign period as well as a greater influence of late campaigning because you'll always shift in response to the current advertising as well.

BY MR. BOPP:

Q. When you say "current advertising," what is it—is it advertising on the same subject or is it no matter what the subjects are you have this effect?

A. In their case, they are looking at total pro- or anti-candidate advertising. So the net advertising for each of the two candidates regardless of the specific nature of the issue.

Q. Has there been any studies on advertisements on a particular issue throughout the time period?

A. Not that I'm aware of.

[86]

Q. And so when you've used the phrase "media 2 message," that would include any public communication. It would include ads, but it would include any public communication like the evening news broadcast, talk radio, anything of that nature?

A. Yes.

(Discussion off record.)

(Recess taken.)

BY MR. BOPP:

Q. By the way, between the time you submitted the draft report and your final report, what conversations did you have with anyone associated with this case?

A. I gave them the draft on—sorry—Wednesday morning. We had a discussion that afternoon at 5:30. Then I gave another draft on Thursday afternoon which resulted in a Friday discussion of typos essentially. And then we had check-in just to make sure where we were in terms of meeting the deadlines and everything. The only—yeah, yeah. I think that's right. Sorry, I don't—I don't think there were other * * *.

* * * * *

[93]

A. That targeting thing, I'm not sure whether that was specific to radio or was television.

Q. Okay.

A. From the document I don't think it's clear whether it was just radio or TV or both.

Q. Okay.

A. I'm just not clear about that.

Q. It says that for this audience, meaning the targeted audience, "the public policy aware adults, ages 45+ with male skew," it says that it is unlikely that political ads will change opinions in this group. Is that what your report is reflecting?

A. If what they were targeting is what that thing said, "public policy aware adults," I understood that to mean people who had substantial amounts of political interest and involvement, so for those people, the messages that they would hear, whether it was the radio or the TV, either one of those, would tend to actually be noticed because they are politically aware and involved and interested, but it's also less likely that it would [94] change someone's mind to the extent that it would, because these are already aware and involved people, they would tend to resist the change if it's a message that runs counter to their preferences. So it should reinforce people that are already concerned about the judicial nominations issue, and it should not be expected to convert someone who feels on the other side. That's what I'm saying.

Q. Okay. Would this be an audience that you would want to target if you were wanting the listener to respond by calling a senator about the issue and lobby them?

A. As an empirical question, these would be the people that are probably most likely to be involved enough to make a phone call or a contact, though they may be people that would already be mobilized. So I think the answer is probably yes, these would be people that would be more likely to make the call than people who are the opposite, unaware, uninvolved, yes.

Q. Turn to page 38. The first full paragraph, the last sentence says, "Early ads matter * * *.

* * * * *

[98] to work their way back down from that if it's a competitive process, but it's not the case that these ads, the moment of 60 days before, say, continue to independently affect the vote as we go along, rather they set the baseline that's then moved about by these other things.

BY MR. BOPP:

Q. Okay.

A. It's a tricky question of auto correlation in the form of the model, which we can talk about if you prefer.

Q. Well, I don't want to get in over my head.

(Plaintiff's Deposition Exhibit Number 30 was marked for identification.)

BY MR. BOPP:

Q. I'm going to show you what's been marked as Exhibit 30. Now—oh, gosh. I take it back. You can't read that. You could before. Sorry, I have no questions on 30. Sorry about that.

Are you familiar with the Wisconsin Advertising Project publishing an online, at least, maybe in other contexts as well, a report called [99] Political Advertising in the 2002 Elections?

A. Not specifically, no.

Q. Okay.

(Plaintiff's Deposition Exhibit Number 31 was marked for identification.)

MR. DEELEY: Jim, before you do that, are you going to leave Exhibit 30 attached to the deposition?

MR. BOPP: Yes.

MR. DEELEY: I'm going to ask to get a copy of it.

MR. BOPP: Yeah, I think we need to do that, even though it's not of much value.

BY MR. BOPP:

Q. I show you what's been marked as Plaintiff's Exhibit 31. Now, this purports to be that report by Professor Goldstein and Rivlin, R-I-V-L—is that his last?

A. —I-N.

Q. —I-N. Right. That was found on the Wisconsin Advertising Project web site. Now, is this the type of report that would be a reliable [100] authority that would be relied upon by people, experts in your field?

A. I haven't seen the report, but given that, yes, this would be a credible source of information.

Q. Would you hand me that. I marked the wrong version. I'll have her—

MR. BOPP: Would you mind just putting Exhibit 31 over top of that.

(Plaintiff's Deposition Exhibit Number 31 was remarked for identification.)

BY MR. BOPP:

Q. I hand you Exhibit 31 and—because I marked the wrong copy. Are you familiar with the Election Law Journal?

A. I'm sorry, just say it again.

Q. The Election Law Journal?

A. No.

MR. BOPP: All right. I have no further questions.

MR. DEELEY: Okay.

* * * * *

[Exhibit 1]

Additional Excerpts from Transcript of Deposition of Charles H. Franklin, III
Exhibit 1

[Filed: June 30, 2006]

* * * * *

[11] to Life and Wisconsin politics, just sort of the setting of the situation, the role of advertising, the role, in general, in election, the role of the particular Wisconsin Right to Life advertising in that 2004 campaign. And the issues of how to specify a regulation or the difficulty over the ability to regulate grassroots or issue advertising in campaigns.

So those were the subject matter that we talked about as being included. And then we had a conversation on May 15th, I believe it was—

Q. Well, before we get to that, May 15th, I'll ask you about that in a second.

A. Yeah.

Q. You said that in early May that the FEC asked you to be a witness. Had you expressed any opinions on the subject maters that were the subject of your expert testimony at that point to them or anyone else associated with the case?

A. In the first conversation I said I didn't know what the advertising was, I hadn't seen it. I was out of the country when it ran, actually, but * * *.

* * * * *

[14] argument coming together. I didn't go into great detail about it, simply to update him that the report was coming along.

Q. You say the argument was "coming together." What did you mean by that?

A. I approached this the way I would a scholarly article, which is to think through what's there, to look at the evidence, and then to formulate my opinion and in formulating my opinion, to write it down, and in that sense the argument was coming together. It was becoming clear in my mind what the report would say and how it would say it.

Q. Okay. What was provided you by the FEC or anyone associated with this litigation to, as part of your efforts to prepare an expert report?

A. There was one binder or clip-together binder, which were the FEC exhibits in opposition to the preliminary injunction, and there was an unlabelled group of documents, which were statements like press releases or e-mails from Wisconsin Right to Life supporters, I believe. Also a description of the advertising was part of that. [15] The script of the TV and radio ads was part of that. The targeting information, the design of the advertising, what its target audience was and what the message was was part of that. There were a couple of other documents in there, but I don't remember precisely what they were. And—

Q. Go ahead.

A. Just to finish.

Q. Sure.

A. Then later in the process, Kevin Deeley e-mailed me documents on the advertising buys, how much both the radio and the TV ad buy was for because I hadn't seen that before.

Q. When you said "the description of the advertising," what did you mean by that?

A. Well, two things, one was the scripts themselves for the two radio ads and for the television ad. Then there was a document that listed the targeting of the ad. It described who the target audience was, Policy, Aware 45 Plus with a mail skew, for example, listed three messages that were part of the goals of the advertising and so on.

[16]

Q. What else did you consult in preparing this report beyond what was provided you by the FEC?

A. I looked at the history of the Feingold elections, so I reviewed the Almanac of American Politics' description of the '92, '98 and 2004 elections. I did a review of the Hot Line political newsletter, I guess we'd call it, digest of election information to construct a chronology that, of those campaigns, and in particular 2004, but also '98.

I did a number of searches of Lexis/Nexis for news stories, both about the campaign and about Wisconsin Right to Life and its involvement in Wisconsin politics. That formed the basis of the section of the report that deals with the historical setting in the campaign and Wisconsin Right to Life in there.

I also did some looking for examples of the judicial nominations issue in other campaigns nationwide. I looked at those in part in what are called storyboards. They are files that are summaries of advertising from the Wisconsin Advertising Project to locate advertising that had [17] shown up in other races. And I did some searches of public opinion data on the question of the judicial filibuster, judicial nominations during that period.

Q. Was there any material that you consulted that you did not cite in the report?

A. There's material that I consulted but didn't cite because I decided it wasn't relevant to the report.

Q. Was there any material that you found that you did not cite in your search that was relevant to the report?

A. I tried to cite everything in the report that I used as a basis for the report.

Q. Now, you mentioned that you researched the filibuster issue as used in advertising. What did you mean by that?

A. I was curious whether this issue had been prominent in other campaigns. I thought at the time that I was looking for it, that that might or might not be relevant, so I did locate some other campaigns where the issue had come up, but in drafting the report, I decided that that wasn't * * *.

* * * * *

[20] impact of those ads, but I didn't have—I didn't have exposure of the individuals to which of those ads. Let me try and phrase that a little better.

Q. Okay.

A. We know that these ads ran, but when the Pew study asked did you see advertising, it doesn't ask which ad did you see. And my purpose in the report was to show that exposure to advertising from either side of the issue or just advertising in general about the issue increased the constraint that I talk about in the report,

so I didn't think that the specific content of the individual ads was relevant at that point.

Q. Now, in looking at those ads, were some of them just on the issue of the filibuster without naming public officials or candidates?

A. Yes, I believe there were.

Q. Were there ads that mentioned public officials or candidates?

A. Yes, there were.

Q. So there was both type?

A. Yes.

* * * * *

[27] ran through May 22nd.

Q. Why did they end?

A. They ended because of the bipartisan agreement, the so-called gang of 14, that resolved the filibuster debate.

Q. Do you know why they, why they began when they began?

MR. DEELEY: Objection, calls for speculation.

A. The Republican leadership had signalled clearly that it was ready to bring an end to the democratic filibuster through the so-called nuclear option, to change the rules to require only 51 votes to end debate on judicial nominations. That was a possibility that had been discussed at some length for some number of months before that, but in the March to May time frame, it was clear that it was going to be scheduled. I don't know if

it was specifically scheduled at that time or not, but it was clear it was coming to a head, and so groups on both sides started to run advertising.

Q. What was the advertising saying?

* * * * *

[38]

A. I would, again, say these are certainly elements of grassroots lobbying, but I wouldn't agree that this is a complete definition of grassroots lobbying.

BY MR. BOPP:

Q. Right, okay. And what I'm asking is whether or not a communication that contained these three elements would fall within the definition of grassroots lobbying?

A. I think it would depend in part on the setting and the nature of the effort beyond this. I agree that these three elements are present in grassroots lobbying campaigns as routinely defined, but one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another.

And so to that extent, I agree that these are characteristics of grassroots lobbying but don't exhaust the nature of it. And I would not say that these three being present necessarily mean that an effort is clearly only a grassroots lobbying effort.

* * * * *

[79] accessible to voters. They are more likely to think of it or include it in their decision calculus. But

competition in the environment also means that voters are also more likely to be exposed to competing messages, and so they are more likely to hear multiple messages about an issue.

Q. And how does competing messages affect the voting behavior, or how one ad affects the voting behavior if there are competing ads, or competing messages, let's—

MR. DEELEY: Objection, compound.

A. The empirical literature shows that voters who are exposed to a message can either accept or reject that message. And so if they are exposed to competing messages, it's more likely they will be exposed to a message that they can agree with and then accept than not. In contrast, in a one-sided message environment, where they only hear one side speaking, it's more likely that those messages will have a net effect on public opinion or vote choice because there is no competing message to reinforce the other side of the issue.

* * * * *

[89] referring to it as a broad issue ad. I was trying to say that it was a generic ad and the thrust of the papers, the report is still what it—was then what it is now, that any advertising, whether it's called grassroots ad or issue ad or electioneering, would have electioneering effects. And so I used the term "issue ad" as a characterization of it. My intent was this broader sense of any advertising.

Q. Or any message?

A. Or any message. Yes, I would agree with that. And so they pointed out that I was being rather imprecise about how I was using that and potentially characterizing the ad in a way that I didn't intend to because I meant this much broader sense, so I changed that.

I also changed most of the repetition of the term "issue ad" to simply "advertisement" or some synonym for that, again, to make my point that this applied to communications during the campaign period generally. I don't think any of those were substantive changes, but they did change the language.

* * * * *

[97] motivating people to lobby on that issue, make the call?

Q. Okay.

MR. DEELEY: Objection, vague.

BY MR. BOPP:

Q. I'm posing a hypothetical and I'll complete my answer.

And, but that the effect, you know, 60 days from there would be ameliorated by subsequent events. Is that a fair summary?

MR. DEELEY: Objection, vague, mischaracterized the testimony.

A. Ameliorated is not quite the right term for the process they are describing in that the effect was real, it adjusted opinion or preference, however it adjusted it. It's simply that all of the subsequent advertising moves opinion from that new starting point. All right. And so

you could say that an early event that moves opinion well up has an effect in that all the subsequent advertising has to affect people that are now, say, 70 percent disposed to an issue or to a candidate, so they have [98] to work their way back down from that if it's a competitive process, but it's not the case that these ads, the moment of 60 days before, say, continue to independently affect the vote as we go along, rather they set the baseline that's then moved about by these other things.

BY MR. BOPP:

Q. Okay.

A. It's a tricky question of autocorrelation in the form of a model, which we can talk about if you prefer.

Q. Well, I don't want to get in over my head.

(Plaintiff's Deposition Exhibit Number 30 was marked for identification.)

BY MR. BOPP:

Q. I'm going to show you what's been marked as exhibit 30. Now—oh, gosh. I take it back. You can't read that. You could before. Sorry, I have no questions on 30. Sorry about that.

Are you familiar with the Wisconsin Advertising Project publishing an online, at least, maybe in other contexts as well, a report called * * *.

* * * * *

[103]

THE WITNESS: But I can continue to answer, right? For the earlier—

BY MR. DEELEY:

Q. Yes, you can answer.

A. Yes, advertising in general is usually multifaceted. It doesn't only focus on one specific thing, so it could aim at persuasion as well as mobilization at the same time. It could aim at effecting legislation by pressuring a Congressman or an office holder, let's say, and at the same time have other purposes. That could be an electioneering purpose in that the sorts of issue ads that I'm talking about that satisfy these conditions, they certainly represent what I take to be a sincere policy position by the organization in opposing whatever policy they are discussing while at the same time having an overt, a direct electioneering consequence.

MR. DEELEY: No further questions.

MR. BOPP: No questions.

(Signature having not been waived, the deposition of CHARLES H. FRANKLIN, Ph.D., was * * *.

* * * * *

Excerpts from Transcript of Deposition of Charles H. Franklin, III

Monday, June 5, 2006

[Filed: July 14, 2006]

* * * * *

[33]

A. Yes.

Q. Do you agree that what's being done there, at least in part, was grassroots lobbying?

MR. DEELEY: Objection, vague.

A. Yes, I would agree that that falls in the usually accepted notion of grassroots lobbying.

BY MR. BOPP:

Q. Was there any aspect of the two campaigns, one on each side, that you reviewed that was not grassroots lobbying, that you would say would be your opinion was not grassroots lobbying?

A. My view is that both the types of ads we've talked about involve grassroots lobbying, that there are, there's a range of what grassroots lobbying covers and I would say both of these fall within that category. They could also equally well, I think, be thought of as issue ads. I believe the distinction between those two is vague, so—

Q. Is vague?

A. Is vague—

Q. Oh.

A. —so I would put them in either-or both [34] categories.

Q. Let's explore that for a minute. You are familiar with the phrase "issue advertising"?

A. Yes.

Q. Now, how would you define that?

A. This is where the vagueness comes in, of course. An issue advertisement, in the broad sense that I use the term, and intended in the report as well, is any advertising by a group, usually not a candidate or a political party, but which discusses an issue, usually takes a position on the issue, and may or may not imply something or say something about candidates or office holders' positions on that issue.

So when I use the term "issue advertising," I mean it in that relatively broad sense. And it's in that sense that these things that we could also call grassroots lobbying are, in my broader terminology, equally well thought of as issue ads.

Q. Would it also be true that the phrase as you define it of "issue advocacy" is broader than [35] what you understand grassroots lobbying to be?

A. To the extent that a grassroots lobbying only implies a connection to a particular office holder, then I think that would be a definitional distinction between the two.

Q. Is it fair to say that grassroots lobbying is, based on your definitions, a subcategory of issue advocacy—or issue ads?

A. Yes, in the sense that I'm using it here and in the report, I think of them as closely linked and that grassroots lobbying, again, for the most part, would be a subcategory of issue ads.

Q. When you are researching the filibuster issue and you found these two campaigns being conducted by these groups on the filibuster issue that we've just been talking about, are you familiar with other groups doing grassroots lobbying on issues about upcoming votes in Congress?

A. Yes.

Q. And when you say you are familiar, what do you mean by that?

A. I mean that I'm aware that such things [36] happen. I have not done a scholarly investigation of such things myself, so I don't have detailed expert knowledge of specific campaigns of that sort.

(Plaintiff's Deposition Exhibit Number 4 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 4. And would you review that document which, I believe, defines various terms associated with lobbying and other forms of advocacy.

(Witness reviews document.)

MR. DEELEY: I object to the document to the extent it's, a margin is cut off.

A. Okay.

BY MR. BOPP:

Q. Now, I'll refer you to page 2 of the exhibit at the bottom, and there's the heading: Grassroots Lobbying. And then it says: Key indicators of grassroots lobbying. And there are three bullets points: Relates to specific

legislation, reflects a point of view on the legislation's merits, encourage general public [37] to Contact legislators.

Do you agree that those are the three key elements of grassroots lobbying?

A. They are certainly three things that do appear within grassroots lobbying. I wouldn't agree that they are wholly and completely definition of grassroots lobbying.

Q. What else would you add?

A. I would include efforts to mobilize supporters as part of that. I would include efforts to persuade the public as part of that.

Q. Generally on an issue?

A. Yes, well, on a specific issue.

Q. Yes. Such as the second type of advertising that you identified that the groups were doing?

A. Yes.

Q. But a communication that contained these three elements, you would agree, is grassroots lobbying?

MR. DEELEY: Objection, mischaracterizes the testimony.

[38]

A. I would, again, say these are certainly elements of grassroots lobbying, but I wouldn't agree that this is a complete definition of grassroots lobbying.

BY MR. BOPP:

Q. Right, okay. And what I'm asking is whether or not a communication that contained these three elements would fall within the definition of grassroots lobbying?

A. I think it would depend in part on the setting and the nature of the effort beyond this. I agree that these three elements are present in grassroots lobbying campaigns as routinely defined, but one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another.

And so to that extent, I agree that these are characteristics of grassroots lobbying but don't exhaust the nature of it. And I would not say that these three being present necessarily mean that an effort is clearly only a grassroots lobbying effort.

[39]

Q. Now, are you—is grassroots lobbying, at least on occasion, tied to upcoming votes in Congress?

A. Yes.

Q. Now, are you familiar with the fact that Congress is often in session in the fall of election years including within 60 days of an election?

A. Yes.

Q. And are you familiar with grassroots lobbying campaigns having been conducted during that period of time to influence an upcoming vote in Congress?

A. I'm not specifically familiar with that.

Q. Would you be surprised or would that be incompatible with your experience that such campaigns would be conducted in that time period?

A. In the past, before these issues before us came up, it certainly is plausible that it would have happened, and I simply don't know of specific cases.

(Plaintiff's Deposition Exhibit Number 5 [40] was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 5. Would you review that document, please.

(Witness reviews document.)

BY MR. BOPP:

Q. Actually, this document should only be a three-page document. Do you have an additional page attached to it?

A. Yes, I do.

Q. Could we pull that off? Sorry.

A. Okay.

Q. I want to refer you specifically to page 2, under the heading "Attempts to Influence Legislation (Lobbying) Defined," in the second paragraph, the last sentence, which begins on line, sixth from the bottom, at the end. It says: "Communication will be treated as encouraging the recipient to take action (but not directly encouraging the recipient to take action—for relevance

of this distinction see exceptions for communications with members below) if it identifies * * *.

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[Exhibit 13]

Declaration of Charles H. Franklin, III
Exhibit 13

[Filed: June 23, 2006]

[Exhibit 1]

Expert Report of Professor
Charles H. Franklin
Professor, Department of Political Science
University of Wisconsin, Madison
Case 1:04-cv-01260-RJL-RWR

June 2, 2006

1 Introduction

In this report I review the circumstances of the 2004 Wisconsin campaign for the United States Senate and discuss the empirical evidence for the effects of advertising in elections.

I have not appeared as an expert witness in the last four years. I am being paid $ 225 per hour for my work on this report.

2 The 2004 Wisconsin Senate Campaign

In 2004 Wisconsin Senator Russell Feingold sought reelection to a third term in the United States Senate. Senator Feingold was initially elected in 1992 when he defeated two term incumbent Robert Kasten with 52.6% of the vote to Kasten's 46.0%. The race was the 10th closest U.S. Senate race of 1992.

In 1998 Feingold faced a two term member of the U.S. House of Representatives, Congressman Mark Neumann of the 1st congressional district. This extremely competitive race ended with Feingold winning by the third narrowest margin in the country, 50.5% for Feingold to 48.4% for Neumann, a margin of less than 38,000 votes.

Both candidates put substantial campaign emphasis on protecting social security, wasteful government spending and balancing the budget. Neumann had established himself as one of the most serious "deficit hawks" in the House, even breaking with his party's leadership at times * * *.

* * * * *

* * * ified *[sic]* endorsement of Darrow on March 5, 2004.[15] In a press release announcing their endorsements, Wisconsin Right to Life PAC also made clear their opposition to Feingold:

> "Russ Feingold is so extreme in his anti-life position and the U.S. Senate is so important to the future of unborn babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections" said Plaff.[16]

In the September 14, 2004 primary Tim Michels won 42.43% followed by Darrow with 30.05%, Welch with 23.09% and Lorge with 4.35%.

The potentially strong Michels campaign failed to catch fire with voters. Despite an attractive and articulate candidate and very high quality ads, Michels could not close the gap with Feingold in the polls. While immediately after the primary he pulled to a 51-45 margin among likely voters in an ABC News poll, he was not able to sustain this performance. Perhaps the worst blow to his campaign came when the National Republican Senatorial Committee reduced its commitment to

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[15] FEC opp. preliminary injunction exhibits 4, 5, and 6.

[16] WRTL news release quoting Bonnie Pfaff Wisconsin Right to Life Pac Chair. FEC opp. preliminary injunction exhibit 4.

the Michels campaign in early October.[17] On October 13 the NRSC announced it was canceling a $1.2 million ad campaign in support of Michels.[18] This was a severe setback not only because it substantially cut pro-Michel's advertising because it left the campaign to explain how things could still be going well if the NRSC had decided to pull out of the race. While the NRSC did eventually commit some resources to the Wisconsin race, it came too late for Michels to recover.

The final outcome was 53.3% for Feingold to 44.1% for Michels. Even so, this was not a large margin for a third term incumbent. The race was the 10th closest Senate race in 2004.

3 The Politics of Judicial Nominations

The issue of judicial nominations became an issue in Senate politics almost from the moment Republicans reclaimed the majority in January 2003. Democrats, now without the majority, could no longer block nominations by simply not bringing them to a vote, as they had done during most of the previous two years.

The Senate custom of unlimited debate provided a mechanism for Democrats to continue to block those judicial nominations which they most strongly opposed. A cloture vote requires 60 votes to cut off debate so long as Democrats remained united, they could block President Bush's nominations.

This in itself would not have created a substantial political issue. In the late Clinton administration it was routine for the Republican controlled Senate to fail to

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[17] Hotline 10/5/2004; Frommer-AP 10/4/2004

[18] Hotline 10/14/2004; Milwaukee Journal Sentinel 10/13/2004.

bring nominations to the floor for a vote. What changed in 2003 was that conservatives, and especially pro-life groups, saw the transformation of the judiciary as key to achieving their policy goals in general and to overturning *Roe* v. *Wade* in particular. This connection of the most divisive and emotional social issue to the confirmation of judges gave the issue a political influence and importance well beyond the normal politics of judicial nominations.

Between March 2003 and June of 2004 Senate Democrats had blocked confirmation votes 16 times. The Senate Republican leadership attempted to break the impasse several times, including a 40 hour marathon session in November 2003. Despite intense pressure the Democrats remained sufficiently united to continue to block a number of nominees (though many more were confirmed with little controversy.)

The Republican leadership made another attempt at ending the deadlock in July 2004, holding four votes on stalled nominations between July 20 and 22, ending with the 20th failed attempt.

Confirmation of judges became an electoral issue as well as a matter of Senate procedure. While the issue did not dominate the fall elections, it did arise fairly often in Republican candidates' statements that they would vote to confirm President Bush's judges. Sen. Orrin Hatch (R-Utah) wrote: "The obstruction of judicial nominations generally, and these filibusters specifically, figured significantly in 2004 Senate races across the country, particularly the race in South Dakota."[19]

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[19] The Hill, http://www.hillnews.com/thehill/export/TheHill/Comment/OpEd/021005.html.accessed6/2/2006.

The stalemate was not broken until May 23, 2005 when a bipartisan coalition of fourteen senators agreed to vote for cloture on most of the President's most controversial judges in exchange for no changes to the filibuster rule and the ability to continue to block nominees that De- * * *.

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[Exhibit 2]

Additional Excerpts from Declaration of Charles H. Franklin, III
Exhibit 2

[Filed: Aug. 30, 2006]

* * * * *

[8] mocrats [*sic*] could not agree to. Since that agreement, the filibuster has not been successfully used to block judicial confirmations.

4 Judicial Nominations in Wisconsin in 2003 and 2004

The subject of judicial nominations was raised as a partisan issue early in the Wisconsin campaign by state Sen. Bob Welch. In three news releases in 2003 Welch raised the issue of the Democratic filibuster against some of President Bush's nominees.[20] In these, Sen. Welch "called on Senator Russ Feingold to end his support of the filibuster of four of President Bush's judicial nominees."[21] He characterized Feingold's support of the filibuster as partisan, saying "the gridlock caused by Russ Feingold's partisanship was appalling. . . . Because of his obstructionism the wheels of justice are in danger of grinding to a halt."[22] On January 16[,] 2004 Welch again issued a news release saying "Refusing to allow qualified jurists like Miguel Estrada, Priscilla Owen, Charles Pickering and others to ever have an up-or-down vote on the Senate floor is back room partisan politics at its worst."[23]

The issue was also used by candidates Darrow and Michel, as discussed in a November 18, 2003 article in the Milwaukee Journal Sentinel.[24] That article quotes

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[20] FEC opp. preliminary injunction exhibits 10 (dated 9/4/2003), 11 (dated 11/12/2003) and 12 (dated 11/14/2003).

[21] FEC opp. preliminary injunction exhibit 11.

[22] FEC opp. preliminary injunction exhibit 10.

[23] FEC opp. preliminary injunction exhibit 13, dated 1/16/2004.

[24] FEC opp. preliminary injunction exhibit 14.

State Republican Chairman Rick Graber saying Wisconsin Republicans are "very well aware of (the issue). It's something the Senate candidates (against Feingold) are talking about at every stop. I think talk radio is talking about it around the state.[25]

On March 5, 2004 Wisconsin Right to Life also linked the filibuster of President Bush's judicial nominees to the pro-life issue agenda and to Sen. Feingold:

> Plfaff also stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race. "No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate. Senators not only vote on legislation affecting the sanctity of human life but they have the power to confirm or not confirm the President's judicial nominations. And it is in the U.S. Supreme Court where the fate of *Roe* v. *Wade* will ultimately be decided. We do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees."[26]

The use of the judicial nominations issue was one of several issues raised in the campaign, but it was raised early and often as a partisan issue with the Republican candidates and Wisconsin Right to Life citing it as a reason to defeat Sen. Feingold.

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[25] FEC opp. preliminary injunction exhibit 14.

[26] WRTL News release quoting Bonnie Pfaff Wisconsin Right to Life Pac Chair. FEC opp. preliminary injunction exhibit 4, dated 3/5/2004.

5 Wisconsin Right to Life in Wisconsin Politics

Wisconsin Right to Life is a very active force in Wisconsin state politics. They routinely endorse candidates for both federal and state offices and are active in providing voter education and mobilization efforts on behalf of candidates. In the September 14, 2004 primary they endorsed 109 candidates, 4 Democrats and 105 Republicans.[27]

WRTL is particularly effective at voter contact and mobilization. Following the November 2, 2004 general election, WRTL issued a press release quoting Legislative/PAC director Susan Armacost as saying "Wisconsin Right to Life is disappointed that the President narrowly lost Wisconsin but we are comforted in knowing that we delivered the pro-life vote for this great man." The news release goes on to say "Wisconsin Right to Life and its chapters reached over one-half million households throughout Wisconsin with phone calls and mailings."[28] In a news released dated November 4, 2004, WRTL said "Wisconsin Right to Life is widely recognized as one of the most effective right to life organizations in the nation. During the past election cycle, the organization carried out extensive statewide activities on behalf of federal and state candidates. In addition, they carried out a number of other activities to bring their one-half million members and supporters to the polls on

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[27] FEC opp. preliminary injunction exhibit 5.

[28] Wisconsin Right to Life news release dated 11/3/2004. http://www.wrtl.org/News04/110304.pdfaccessed on the WRTL web site 5/27/2006.

election day to vote for Wisconsin Right to Life PAC-endorsed candidates."[29]

[29] WRTL news release dated 11/4/2004, http://www.wrtl.org/ News04/ 110404.

[Exhibit 3]

Exhibit A from Second Affidavit of Barbara L. Lyons
Exhibit 3

[Filed: June 23, 2006]

January 27, 2006

Filibuster Radio Ad: 60 Seconds

Some Senators are at it again. Threatening to filibuster qualified judicial nominees. This time, the stakes are even higher. They want to use the filibuster to block a vote on the nomination of Judge Samuel Alito for the U.S. Supreme Court.

Judge Alito has received the highest qualification rating for judicial nominees and deserves a simple "yes" or "no" vote to prevent gridlock in our judicial system.

Contact Senators Feingold and Kohl at 202-224-3121 and tell them to oppose the filibuster of Judge Samuel Alito for the U.S. Supreme Court. That's 202-224-3121.

Paid for by Wisconsin Right to Life, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committe.

[Exhibit A]